(25,283)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 476.

NICHOLAS V. BILBY AND H. B. MOFFITT, PLAINTIFFS IN ERROR,

vs.

ALBERT STEWART, LUCY STEWART, WILLIE CORNELL, BEN REED, SAMPSON BUCK, AND NATHAN STEWART.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

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a

Return to Writ.

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within entitled cause, as requested by the præcipe on file herein, filed by the plaintiff in error.

In Witness Whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Oklahoma, in the City of Oklahoma City, this 4 day of April, 1916.

[Seal Supreme Court State of Oklahoma.]

WM. M. FRANKLIN,
Clerk Supreme Court of Oklahoma.

Cost of Transcript.

Paid by Plaintiff in error	$45.00
Costs in Supreme Court of State	21.75
	$66.75

1 UNITED STATES OF AMERICA, *ss:*

To Albert Stewart, Lucy Stewart, Willie Cornell, Ben Reed, Sampson Buck and Nathan Stewart, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of the State of Oklahoma wherein Nicholas V. Bilby and H. B. Moffit are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Matthew J. Kane, Chief Justice of the Supreme Court of the State of Oklahoma, this 15 day of March, in the year of our Lord one thousand nine hundred and sixteen.

[Seal Supreme Court State of Oklahoma.]

MATTHEW J. KANE,
Chief Justice of the Supreme Court of the State of Oklahoma.

Attest:

WM. M. FRANKLIN,
Clerk of the Supreme Court of the State of Oklahoma.

1½ We hereby accept service of this within and foregoing Summons in Error for the within named Defendants in Error.

Mar. 15, 1916.

GEO. C. CRUMP,
J. L. SKINNER,
Attorneys for Defendants in Error.

Filed Mar. 15, 1916. William M. Franklin, Clerk.

2 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the Honorable the Judges of the Supreme Court of the State of Oklahoma, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Oklahoma, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Nicholas V. Bilby and H. B. Moffitt, plaintiffs in error, and Albert Wtewart, Lucy Stewart, Willie Cornell, Ben Reed, Sampson Buck and Nathan Stewart, are defendants in error wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or
3 statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said Nicholas V. Bilby and H. B. Moffitt as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the

United States, the 15th day of March, in the year of our Lord one thousand nine hundred and sixteen.

[Seal United States District Court, Western District of Oklahoma.]

ARNOLD C. DOLDE,
Clerk of the United States District Court for the Western District of Oklahoma.

Allowed by
MATTHEW J. KANE,
Chief Justice of the Supreme Court of the State of Oklahoma.

Filed March —, 1916. Arnold C. Dolde, Clerk.

[Endorsed:] Filed Mar. 15, 1916. William M. Franklin, Clerk.

4 In the Supreme Court of the State of Oklahoma.

Filed Mar. 15, 1916. William M. Franklin, Clerk.

No. 5702.

NICHOLAS V. BILBY and H. B. MOFFITT, Plaintiffs in Error
vs.
ALBERT STEWART et al., Defendants in Error.

Præcipe for Record for the Supreme Court of the State of Oklahoma.

To the Clerk of the Supreme Court of the State of Oklahoma:

You are hereby requested by the plaintiffs in error to make a transcript of the record in the above styled suit to be printed and filed in the Supreme Court of the United States to which said case is now being taken on writ of error from the decision of said Supreme Court of said State, and to include in said transcript of record the following and no other papers and matters:

1st. Petition for probation of the Will;
2nd. Answer thereto to Ben Reed;
3rd. Answer of Plaintiffs in Error to answer of Ben Reed and others;
4th. Judgment of the County Court;
5th. Judgment of said District Court;
6th. Motion of plaintiffs in error March 17, 1913, page 167 C. M.
7th. Motion of plaintiffs in error March 24, 1913, page 173 C. M.
8th. All the evidence in Chief for plaintiff in error;
9th. All the evidence for defendants in error;
10th. All the evidence in rebuttal for plaintiffs in error;
11th. Order of the District Court overruling motion, page 176 C. M.

12th. Petition in error of plaintiffs in error;
13th. Order of the Court correcting case made (in front of case made);
14th. Decision of the Supreme Court of the State;
15th. Order of the Supreme Court overruling petition for rehearing;
16th. Application of plaintiffs in error for leave to file petition for rehearing;
17th. Answer thereto of defendants in error;
18th. Order of the Supreme Court denying said application;
19th. Petition for writ of error to the Supreme Court of the United States;
19½. Allowance of Writ;
20th. Writ of Error from U. S. Supreme Court;
21st. Assignments of Error;
21½. Citation;
22nd. Supersedeas Bond for such writ of error.
23rd. Præcipe for record;
Items 19 to 22 inclusive and filed with this court to be attached to the record, as provided by law in such cases.
March 15th, 1916.

LEWIS C. LAWSON,
Counsel for Plaintiffs in Error.

We, the undersigned counsel of record for the defendants in error in the foregoing cause, do hereby acknowledge the receipt of the foregoing designation of parts of the record in said case; and agree that the same is all of said record which we desire therein or which is necessary for the consideration of the errors assigned by said plaintiffs in error in their assignment of errors to the Supreme Court of the United States, and hereby waive the designation of any other part or parts of the record therein for such purposes, and agree that said matters and record may be made up at once and forwarded to the Supreme Court of the United States for final decision in said matters.
Dated this 15th day of March, 1916.

GEO. C. CRUMP,
J. L. SKINNER,
Practicing as Crump & Skinner, and Counsel for said Defendants in Error in said Cause.

6 *Petition for Probate of Will.*

STATE OF OKLAHOMA,
Hughes County:

In the County Court.

In the Matter of the Estate of WACO BRUNER, Deceased.

Come now H. B. Moffit and shows to the Court: That Waco Bruner departed this life at the residence of Thos. Sewell in Hughes

Co. on or about the 21st day of November, 1912; that said decedent at the time of his death was a resident of Hughes County, State of Oklahoma, that said decedent left estate in the County of Hughes, State of Oklahoma, the general character and probablevalue of which is hereinafter stated; that said decedent left a will bearing date of about the 18th day of March, 1911, which petitioner alleges to be the last will and testament of said deceased, and which is herewith presented for probate; that H. B. Moffit the person named in said will as Executor to act as such.

That W. E. Templeman for whom letters testamentary are prayed herein is a resident of Hughes County, State of Oklahoma, his post office address being Holdenville, Okla.

That the names, ages and residence of the heirs and devisees of decedent so far as known to petitioner, are as follows:

NAME.	AGE.	RESIDENCE P. O..
N. V. Bilby	42	Holdenville, Okla.
Albert Stewart	45	" "
Lucy Stewart	—	" "
Ben Reed	—	" "

The general character and probable value of said estate is as follows: Consists of the allotment of deceased, described as East Half (½) of Northeast Quarter (¼) of Section Seven (7) and the West Half (½) of Northwest Quarter (¼) of Section Eight (8), all in Township Six (6) North, Range Nine (9) East, of the probable value of $1000.00.

Wherefore, petitioner prays that upon hearing hereof said Will be admitted to probate and letters testamentary issue to said W. E. Templemen.

H. B. MOFFIT.

7 Endorsements: No. 1556. In the matter of the Estate of Waco Bruner, deceased. Petition for Probate of Will. Filed Nov. 23, 1912. J. E. Simpson, Clerk County Court. District Court, County of Hughes, State of Oklahoma. Filed Mar. 4, 1913. G. W. Beavers, District Clerk.

8 I, Waco Bruner, of Hughes County, State of Oklahoma, being of the age of fifty-eight years, and being now in full strength of mind but of poor health, and being sensible of the uncertainty of life, and desiring to make disposition of my property and affairs while in condition so to do, do hereby make, publish and declare the following to be my last will and testament, hereby revoking and cancelling all other former wills by me at any time made.

1st.

I hereby direct the payment of all my just debts and funeral expenses.

2nd.

To my uncle, Albert Stewart, I hereby give the sum of Ten ($10.00) Dollars.

3rd.

To my Aunt, Lucy Stewart, I hereby give the sum of Ten ($10.00) Dollars.

4th.

To my nephew, Ben Reed, I hereby give the sum of Five ($5.00) Dollars.

5th.

To my friend and keeper, N. V. Bilby, I hereby give, devise and bequeath all the balance and residue of my estate, both real and personal including the real property allotted to me as a citizen of the Creek or Muskogee Nation and described as follows: The West Half (½) of the North-West Quarter (¼) of Section Eight (8) and the East Half (½) of the North-East Quarter (¼) of Section Nine (9) East, in Hughes County, State of Oklahoma.

Having no wife and no children and no relatives nearer than those herein remembered and feeling under no obligations to them, and realizing the acts of kindness heretofore shown me by my friend Mr. N. V. Bilby, he having furnished me with livelyhood, food and clothing, for the last twelve years, and leaving no one other than Mr. Bilby to look to for my care and comfort and the necessaries of life for the future of my life, and fully realizing that he will provide for me fully, I have made him the bequest herein.

I hereby appoint and designate H. B. Moffit sole executor of this, my last will and testament.

In witness whereof I, Waco Bruner, have to this my last will and testament consisting of one double sheet of paper subscribed my name this 18th day of March A. D. 1911.

his
WACO x BRUNER.
mark.

The name of Waco Brunner was written by me and I witness his mark. I wrote his name at his request & presence.
JAMES A. LONG.

Subscribed by Waco Bruner, in the presence of each of us, the undersigned, and at the same time declared by him to us to be his last will and testament, and we, thereupon at the request of Waco Bruner, in his presence and in the presence of each other, sign our names hereto as witnesses this 18th day of March A. D. 1911.

JAMES A. LONG,
Wetunka, Ok.
J. R. DUTTON,
Holdenville, Okla.

STATE OF OKLAHOMA,
County of Hughes. ss:

Before me, L. S. Fawcett. United States Commissioner in and for the Eastern District of Oklahoma, on this 18th day of March, 1911 personally appeared Waco Bruner, to me personally known to be the identical person who executed the within and foregoing instrument declaring the same to be his last will and testament, and acknowledged to me that he executed the same as his free and voluntary act and deed for the uses and purposes therein set forth, and said will is by me approved.

L. S. FAWCETT,
United States Commissioner, East. Dist. Okla.

Filed for Probate this 23" day of Nov. 1912.
J. E. SIMPSON,
Clerk County Court.

"Ex. One for Pltf." Hall Dist. Court.

"Ex. A," Stewart Co. Court.

10 STATE OF OKLAHOMA,
County of Hughes. ss:

In the County Court.

In the Matter of the Estate of WACO BRUNER, Deceased.

No. —.

Objections to Probate of Purported Will.

Comes now Ben Reed who states that he is a nephew of Waco Bruner and that as such nephew he is an heir of the said Waco Bruner, and objects to the probate of the purported will filed in this case by N. V. Bilby and for reasons, says:

1.

That said Waco Bruner was a full-blood Indian, duly enrolled as such according to the record of the Dawes Commission to the Five Civilized Tribes of the Indian Territory; that as such full-blood Indian he had no right to make the purported will which has been filed herein for probate; that said Waco Bruner was prohibited by statute from alienating, conveying or incumbering his real property while he was living, and under the law, he had no right to execute said will, and that said will is therefore void and a nullity.

2.

The undersigned most respectfully represents and alleges that the purported will, which purports to have been executed on the 18th day

of March, 1911, was not executed, attested and witnessed as by law required.

3.

That the execution of said purported will filed herein for probate was procured by fraud practiced upon the said Waco Bruner by N. V. Bilby, and others, working for the said N. V. Bilby, and in his behalf.

4.

The undersigned further alleges that at the time of the execution of the alleged will, that undue influence was exercised over and upon the said Waco Bruner by the said N. V. Bilby, his agents and employees, and that by reason of the improper exercise of said influence and duress, the execution of said purported will was obtained.

11

5.

The undersigned further aver that at the time of the execution of said alleged will filed herein for probate, that the said Waco Bruner was not of sound mind; that he was incapable of properly appreciating the objects of his bounty; that he was weak minded, easily influenced and incapable of forming an intelligent conception of his property and the objects of his bounty.

6.

Petitioner further state- that he is of Indian blood and blood relation of the said Waco Bruner, and that said N. V. Bilby, the beneficiary of the purported will filed herein, is not of Indian blood hails from the State of Nebraska and is of no relation, either by blood or marriage, to the said Waco Bruner, who is a full-blood Creek Indian, and that the purported gift purported to be bequeathed by said will is against nature and justice.

BEN REED.

Endorsements: No. —. In the matter of the estate of Waco Bruner, deceased. Objections of Ben Reed, to purported will of N. V. Bilby. Filed this the 15th day of January A. D. 1913. E. M. Washington, Clerk County Court. District Court County of Hughes, State of Oklahoma. Filed Mar. 4, 1913. G. W. Beavers, District Clerk.

12 In the County Court of Hughes County, State of Oklahoma.

No. 1556.

In the Matters of the Estate of WACO BRUNER, Deceased.

Comes now H. B. Moffit, proponent, Nicholas V. Bilby the beneficiary under the will and testament of said Waco Bruner and for

his answer to the contest of Ben Reed, Albert F. Stewart, Lucy Stewart, Willie Cornell, Simpson Buck and Nathan Stewart to the probation of said will and testament, denies each and every charge, statement and allegation made and contained in said written contests and each of them not hereinafter admitted.

Second.

Said Bilby hereby admits that said Waco Bruner was a full-blood Creek Citizen and was so enrolled, and alleges that said decedent, at the time of his death and at the time said will was made on the 18th of March, 1911, had no wife, father, mother or children then living; nor had he any relatives of nearer kinship than those mentioned in said will at the time of making said will or at his death; and that on said respective dates, said Waco Bruner was then of lawful age and sound mind and memory.

Third.

Said Bilby specially denies that said will was not executed, attested and witnessed as by law required; that the same was procured by fraud practiced upon said decedent by said Bilby, or by any other person or persons, working for said Bilby and in his behalf; and denies that undue influence was exercised over and upon said decedent by said Bilby, his agents and employees; and denies that by reason — the improper exercise of said influence and duress, the execution of said will was obtained; that he also denies that at the time of the execution of said will said decedent was not of sound mind, or was of weak mind and did not properly appreciate the objects of his bounty; or that he was easily influenced and incapable of forming any intelligent conception of his property and the objects of
13 his bounty, each and all of which charges made in said respective contests said N. V. Bilby hereby emphatically denies, and states that the same are false and untrue and that at the time of making said will Waco Bruner was of sound mind and memory and fully capable of making said will, and that said decedent did make and execute said will without any undue, fraud, menace or duress exercised upon him to induce him to make said will by said Bilby, his agents or employees or any one else for him or in his behalf or in his interest; and further states that said will was freely made and duly executed by said Waco Bruner without any undue influence, fraud, menace or duress practiced upon him therein by said Bilby or by any one else for him or on his behalf.

Fourth.

Said Bilby further charges and avers that the statute of the State of Oklahoma relied upon said contestants, and all statutes and laws therein mentioned, referred to and relied upon by said contestants, to defeat the execution and probation of said will and testament of said decedent are repugnant to, and in open violation to an act of

Congress entitled "An Act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes," and especially section 23 of said act; also another act of Congress entitled "An Act for the removal of restrictions from part of the lands of allottees of the Five Civilized Tribes and for other purposes," and especially section eight thereof; and that the same are also repugnant to and in violation of another act of Congress entitled "An Act to ratify and confirm an agreement with the Muskogee or Creek Tribe of Indians, and other purposes," and especially section seven thereof; and another act of Congress entitled "An act to ratify and confirm a supplemental agreement with the Creek tribe of Indians, and for other purposes," and especially section sixteen thereof; each and all of which said acts of Congress are hereby relied upon by this said beneficiary under said will, Nicholas V. Bilby, in the establishment and probation of said will; and said Bilby further charges and avers that said statutes of said state and laws thereof relied upon by said contestants are repugnant to and in violation of the rights, title and interest of said Bilby in and to said lands and estate thus devised to him under said will, and mentioned and
14 described therein; and, therefore, said Bilby hereby presents and insists that said state laws and statutes so relied upon by said contestants are null, void and ineffectual as to said will and the rights, title and interest of said Bilby in and to the lands and other property therein described, under and by reason of said acts of Congress and their respective provisions pertaining the power of such Creek citizen to make will and dispose of their property; and further charge that said Waco Bruner never had any children and was never married, in his lifetime.

H. B. MOFFIT, *Proponent.*
NICHOLAS V. BILBY,
By Counsel.

LEWIS C. LAWSON,
Counsel.

District Court. County of Hughes State of Oklahoma. Filed Mar. 4, 1913. G. W. Beavers, District Clerk.

15 STATE OF OKLAHOMA,
County of Hughes, ss:

In the County Court.

No. 1556.

In the Matter of the Estate of Wego Bruner or WACO BRUNER, Deceased.

Findings of Fact. Conclusions of Law and Judgment of the Court.

Now, on this the 16th day of January, A. D., 1913, came on to be heard the matter of the probate of the alleged will of Waco Bruner,

who was known as Wego Bruner also, upon the petition filed hereto by the proponent, H. B. Moffitt and the Court, after hearing various witnesses relating to the issue involved in this hearing, and argument of counsel, concludes as follows, to-wit:

Findings of Fact.

The Court finds as a fact that the will filed herein for probate, bearing date of the 18th day of March, 1911, purported to be executed by the said Waco Bruner, was in all respects properly executed and attested by witnesses thereto as by law required. The Court further finds that at the time of the execution of the said purported will, the said Waco Bruner possessed testamentary mental capacity and did not execute said will by reason of any undue influence exercised upon him by said N. V. Bilby or any other person. The Court further finds that the making of said will by Waco Brunner was done voluntarily and was his own free act and accord. The Court further finds as a fact that the said Waco Brunner was a full-blood Creek Indian and duly enrolled as such, and by reason of being such full blood Creek Indian, he was incapable of conveying the lands purported to be conveyed and transferred by said will.

Conclusions of Law.

Upon the above findings of facts herein, the court concludes as a matter of law, that the will filed herein, executed by Waco Bruner, conveying the allotment of said Waco Brunner to N. V. Bilby should be denied probate for the reason that said Waco Bruner is a
16 full blood Creek Indian, duly enrolled as such, and, as such Indian, was prohibited by law from alienating or conveying the lands by will asked to be devised by said will.

Judgment of the Court.

It is therefore considered, ordered and adjudged and decreed by the court that the said will filed herein be, and the same is hereby denied probate and held to be inoperative as a will and is by the court rejected as such will. It is further ordered and adjudged by the court that the proponent, N. V. Bilby, pay the cost of this action.

Given under my hand this the 16th day of January, A. D., 1913.

J. ROSS BAILTY, *County Judge.*

Filed in District Court March 4, 1913. C. W. Beavers, District Clerk.

17 STATE OF OKLAHOMA,
Hughes County, ss:

In the District Court.

No. 1235.

In re Estate of WACO BRUNER, Deceased.

Journal Entry.

Now, on this the 15th day of March, A. D., 1913, the above entitled cause coming on to be heard, and the proponent, N. V. Bilby, appearing by his Attorneys, H. B. Moffitt and Lewis C. Lawson, and the Contestants appearing in person and by their Attorneys, Crump & Skinner, and both parties announcing ready for trial, and by agreement of all parties and the Court, a jury is called to try the issues of facts in said cause, whereupon a jury was impaneled and duly sworn as by law provided to try the facts in said cause, after which both parties introduced their testimony and rested their case, the Court instructs the jury in writing as to the law of the case, after which counsel for both sides argue the case to the jury, and the jury, after hearing all of the evidence introduced by both sides, the instructions of the Court and argument of counsel, retire into the jury room in charge of their sworn bailiff to consider their verdict on the two questions submitted to them by the Court, and after due deliberation of the same, said jury return into Court and report the following verdicts upon the two questions of fact submitted to them by the Court, as follows, to-wit:

In re Estate of WACO BRUNER, Deceased.

Q. Did N. V. Bilby use undue influence in order to procure Waco Bruner to make the alleged will?
A. Yes.
(Signed) T. K. SANDERSON, *Foreman.*

In re Estate of WACO BRUNER, Deceased.

Q. Did Waco Bruner at the time of the execution of the alleged will have a sound and disposing mind and mental capacity
18 to execute it?
A. No.
(Signed) T. K. SANDERSON, *Foreman.*

Which verdicts were read in open Court in the presence of the jury and upon being asked if these were their verdicts answered that they were, whereupon said jury was discharged from further service in said cause.

And now, on this the 22nd day of March, 1913, said cause coming

on for further hearing before the Court, upon Proponent's Motion to set aside the verdict or special findings of the jury in said cause or grant them a new trial or give judgment notwithstanding the verdict of the jury, and both parties appearing by their respective attorneys, the Court, after hearing argument of counsel for both sides, and being fully and sufficiently advised in the premises, sustains said motion relative to undue influence exercised by the proponent, N. V. Bilby, and rejects the findings of the jury on that question for the reason that the evidence introduced in said cause does not sustain said finding, and the Court overrules said motion relative to the mental condition of the mind of Waco Bruner, and makes the findings of the jury on that question the findings of the Court, and hereby approves the verdict of the jury wherein they found that at the time of the execution of said will the said Waco Bruner did not have a sound and disposing mind, to which action of the Court in overruling said motion as to that question of fact relative to mental conditions, the proponent, N. V. Bilby excepts.

It is therefore considered, ordered and adjudged by the Court that the purported will fil-d herein for probate by N. V. Bilby, be denied probate for the reason that said will was executed at a time when the said Waco Bruner did not possess a sound and disposing mind.

It is the further order of the Court that this cause be remanded by this Court to the County Court of Hughes County, Oklahoma, and that judgment be entered in said County Court of Hughes County, conforming to the judgment of this court, and the Clerk of this Court is hereby ordered and directed to certify copy of this decree, within the next sixty days from this date, to the Clerk
19 of the County Court of Hughes County, Oklahoma, to which judgment of the Court the proponent, N. V. Bilby excepts.

Given under my hand this the 22nd day of March, 1913.

JOHN CARUTHERS,
District Judge.

Endorsements: No. 1235. In re Estate of Waco Bruner, Deceased. Journal Entry. Filed this 22 day of March, 1913. G. W. Beavers, Clerk. By Lloyd Thomas, Deputy.

20 No. 1235.

In re Estate of WACO BRUNER, Deceased.

Comes now proponent, H. B. Moffitt and Nicholas V. Bilby, on this the 17th day of March, 1913, and move the Court to set aside the verdict or special findings of the jury in this case and either grant them a new trial herein or give judgment herein regardless of said special findings of said jury, upon the following grounds and for the following reasons:

First. Because this is a proceeding for the probation of the last will and testament of said decedent, in which and like case such matters are presented to the court and not to the jury and it is competent

for the court only to ascertain and determine such matters, the responsibility of which cannot be conferred upon a jury; nor are the findings of said jury of any legal force or effect, or binding upon either the court or any of the parties to this proceedings.

Second. Because, after all the testimony of both proponents and contestants had been adduced in the case and finally submitted and both sides had closed the case, and was ready for argument, the said contestants herein admitted of record such matters and the testimony in the case showed a prima facie case in favor of the proponents, which said admission admitted the following facts, 1st, that said Waco Bruner when he made said will, was of lawful age; 2nd, that he was of sound mind; 3rd, that he signed said will in the presence of said attesting witness; 4th, that said will was properly witnessed; and, 5th, that said decedent, after the execution of said will, duly published the same to said subscribing witnesses, as is required by the statute of this state; and said facts having been thus admitted by said contestants by so admitting that on all the testimony in the case the proponents had made a prima facie case, it thereafter became a proposition of law, and not of fact, what should be done with said instrument—whether it should be probated or rejected. Contestants having thus made this admission that proponents had made a prima facie case on all the testimony, they thereby admitted that said will
21 was entitled to probation, and the same should be so probated, as there was not, after such testimony was all in and upon its force and effect, contestants thus made said admission on the record, any way, manner or means whereby this prima facie proof of the due execution of said will could possibly be overcome, denied or disputed; and proponents were entitled, upon said admission, to judgement for the probation of said will, and are still entitled to the same notwithstanding the verdict or special findings of said jury.

Third. Because, after said contestants made said admissions before said matters were submitted to the jury, as aforesaid, such admission in legal force and effect withdrew all matters of fact from before the jury and left nothing whatever to be determined by the jury; nor could the jury, after such admission, find any fact or facts contrary to the facts thus admitted which was that all the testimony established a prima facie case in favor of the probation of said will and the same could not be overcome by any finding of said jury to the contrary.

Third. Because said verdict or special findings of the facts submitted to the jury are contrary to the facts thus admitted by the contestants and the legal consequence thereof; and are likewise contrary to the evidence adduced in this case and wholly unsupportd by the evidence herein adduced; and especially is the finding that said will was procured by the undue influence etc. of said Nicholas V. Bilby wholly unsupported by the testimony and proofs taken in this case, there being absolutely no evidence whatever that said Bilby exerted or used any influence whatever over the mind or actions of said decedent which in any sense caused said decedent to make said will in favor of said Bilby; and said finding is wholly unsupported by any evidence in the case, and, therefore, has nothing whatever to support

it or on which it can stand; and said findings of the jury are contrary to the weight of the evidence adduced in the case.

Fourth. Because the Court erred in failing and refusing to give to the jury the instructions prepared and presented to the Court by the proponents herein numbered consecutively from 1 to 12 inclusively and which said instructions are hereby referred to and asked to be read and considered herewith as part of this ground.

22 Fifth. Because said verdict or special findings of the jury *is* not sustained by sufficient evidence, and are contrary to law.

Sixth. Because of the errors of law occurring at the trial and excepted to by the proponents as shown in and upon the face of the record and evidence taken in this case.

H. B. MOFFITT,
NICHOLAS V. BILBY,
Proponents.

LEWIS C. LAWSON,
Counsel for Proponents.

Endorsements: In re Estate of Waco Bruner, dec. No. 1235. Motion of Proponents for new trial and judgment etc. District Court, County of Hughes, State of Oklahoma. Filed Mar. 17, 1913. G. W. Beavers, District Clerk. By Lloyd Thomas, Deputy.

23 No. 1556.

In re Estate of WACO BRUNER, Deceased.

Come now the proponents, H. B. Moffitt and Nicholas V. Bilby, on this the 24th day of March, 1913, and move the Court to set aside the judgment and decree rendered in said cause by the court on the 22nd day of March, 1913, and grant them a new trial herein, upon the following grounds and for the following reasons:

First. Because the Court erred in failing and refusing to sustain the motion of said proponents heretofore filed as to the verdict of the jury wherein said jury found that at the time said will of the said Waco Bruner was executed, the said Waco Bruner did not have testamentary capacity and was not at said time of sound mind; and for reason of this motion on said ground state that said verdict and judgment is not sustained by sufficient evidence to show that said decedent, at the time of making said will, was not of sound mind; but on the contrary, proponents further state that the testimony of L. S. Fawcett, James A. Long, J. R. Dutton and H. B. Moffitt who were alone present at the time said will was executed, conclusively show and establish that, at the time said decedent executed said will, the said Waco Bruner was of sound mind and fully understood and comprehended his said will and the objects of his bounty in all respects necessary to execute a valid will and disposition of his property.

Second. Because the Court erred in overruling the said motion of said proponents to set aside said verdict and findings of the jury and render a judgment herein in favor of said proponents probating

said will, as therein prayed for, and in failing to pass upon the legal effect of said contestants admitting upon the record of the case after all the evidence in the case had been adduced that said proponents still had made a prima facie case for the probation of said will; and proponents hereby refer to said motion and ask that the same be read and considered herewith as part hereof as completely in every respect as if again set forth in haec verba.

24 Third. Because the finding of the court that at the time said decedent made said will he was not of sound mind is not sustained by sufficient evidence in the case; but is contrary to the law and the evidence, adduced on the trial of the case.

Fourth. Because, after all the evidence had been herein adduced by proponents and contestants, said contestants conceded upon the record of the case that said proponents had still made out a prima facie, which admission itself entitled said will to probate; and being thus entitled to probation, nothing thereafter could, or did, overcome such conditions of the case at the close of the submission of the evidence therein, and said findings of the jury had no effect whatever upon the right of the proponents to have said will probated, as the probation thereof from the time of such admission became a proposition of law, and not of fact; and said judgment of said court finding that at the time said will was thus executed said decedent was not of sound mind is contrary not only to said admission and its legal effect, but likewise contrary to the law and the evidence taken in the case, as shown by the record herein.

Fifth. Because of the error of law occurring at the trial and duly excepted to by said proponents.

LEWIS C. LAWSON,
Counsel for said Proponents.

Endorsed: In re Estate of Waco Bruner, Dec. No. 1235. Motion for New Trial. Filed Mar. 24, 1913. G. W. Beavers, District Clerk. By Lloyd Thomas, Deputy.

25 STATE OF OKLAHOMA,
County of Hughes, ss:

In the District Court.

No. 1235.

In the Matter of the Last Will and Testament of WACO BRUNER, Deceased.

Be it remembered, That on the 15th day of March, A. D., 1913, the same being one of the Judicial days of the regular March 1913 Term of the District Court in and for Hughes County, Oklahoma, the above entitled cause came regularly on for hearing before his Honor, John Caruthers, Judge of the Ninth District Court Judicial District, State of Oklahoma, and a jury of said Court, upon the

pleadings heretofore filed in said cause, whereupon the following proceedings were had and testimony taken, viz:

Appearances:

Messrs. H. B. Moffitt and Lewis C. Lawson appearing for Proponent, N. V. Bilby.
Messrs. Crump & Skinner, Appearing for proponent.
A. F. Hall, Court Reporter.

26 Whereupon the selection of the jury was commenced by both parties, after both having announced ready for trial, and the jury having been completed, said jury is by the Clerk of this Court duly sworn as by law provided to try the issues in said cause.

Whereupon the witnesses both for the Proponents and the Contestant, were duly sworn in a body in open Court, and the rule having been called for, were excluded from the Court room under the strict admonition of the Court.

Whereupon the Proponent, Through his Attorneys, makes brief statement of his case to the Court and jury, after which counsel for contestant makes brief statement of case to court and jury.

Whereupon, the Proponent, to maintain the issues on his part introduced the following testimony, viz:

L. S. FAWCETT, a witness produced, sworn and examined on behalf of the Proponent, testified as follows, to-wit:

Direct examination.

By Mr. H. B. Moffitt:

Q. Stat- your name?
A. L. S. Fawcett.
Q. Have you been sworn as a witness in this case.
A. Yes sir.
Q. Where do you live?
A. Holdenville.
Q. What is your occupation?
A. Lawyer and United States Commissioner.
Q. How long have you held the official position as United States Commissioner here?
A. For five to six years.
Q. How long have you resided in Holdenville?
A. About twelve years.
Q. State your age please?
A. Sixty-seven.
27 Q. Did you know Waco Bruner in his life time?
A. I did.
Q. Did you see him on or about the 18th day of March, 1911?
A. I could not state as to the time, I did not have—I have no data that I had at that time.
Q. I hand you an instrument the Stenographer has marked Exhibit One (Here paper is marked by Stenographer as Exhibit one and presented to witness) I will ask you to state what it is?

A. (Witness looks at Exhibit.) It is a will—purported to be a will of Waco Bruner.

Q. By refreshing you- recollection from the acknowledgement on the back of that will, I now ask you if you saw Waco Bruner on or about the 18th day of March, 1911?

A. I did.

Q. Where did you see him?

A. In my office in Holdenville, and your office, being the same suite of rooms.

Q. Did you have a conversation with him there that day?

A. A short conversation.

Q. Under what circumstances was this conversation had?

A. He came to my desk from the other end of the office where he had been with you and brought this paper (referring to Exhibit) to me and said that he wished me to approve it as his will.

Q. As United States Commissioner?

A. Yes sir.

Q. And did you do so?

A. I did.

Q. Did you have a conversation with him at that time relative to the disposition that he was making of his property?

A. I did.

Q. State what he said?

A. I read the will over to him and asked him if he understood it, and understood what he was doing, and whether this disposition made by *by* paper of his property was such disposition as he
28 wished to have stand as his will.

Q. What did he say?

A. He said that was.

Q. Did you speak to him in English?

A. Yes sir.

Q. Did he answer you in English?

A. Yes sir.

Q. Did he appear to be an Indian?

A. Yes sir.

Q. What was his apparent age?

A. I am not good at an estimate of that kind, but a man, as we say medium age, I would take it any way from thirty-five to fifty.

Q. Is that your signature on the back of that will?

A. Yes sir, it is (referring to exhibit).

Q. Approving the will as United States Commissioner?

A. It is.

Q. I will ask you, Judge Fawcett, if from your observation of Waco Bruner at that time and your conversation with him you consider him mentally competent or incompetent?

By Mr. Skinner: Objected to as incompetent, irrelevant and immaterial what he considers it.

By the Court: I don't think the question is competent, I don't think that question is competent, not expert, can't give exactly as to the mental condition. Objection sustained.

By Mr. Lawson: We except.

By Mr. Moffitt:

Q. I will ask you, Judge Fawcett, to state your conversation with Waco Bruner there at that time, at the time you took his acknowledgement and approved this will, and your observation of him, whether or not you consider in your opinion he had testamentary capacity.

29 By Mr. Skinner: Objected to as incompetent, irrelevant and immaterial. It makes no difference what he considers.

By the Court: Objection sustained.

By Mr. Moffitt: Proponents except.

By Mr. Moffitt:

Q. I will ask you, Judge Fawcett, whether or not, at the time you took this acknowledgement to this will and approved it as United States Commissioner, in your opinion Waco Bruner was of sound or unsound mind?

By Mr. Skinner: Objected to as incompetent, irrelevant and immaterial.

By the Court: Objection overruled.

By Mr. Skinner: We except.

By the Witness:

A. I think he was of sound mind.

By Mr. Moffitt:

Q. In your conversation with him, did he tell you or give to you any reason for making the devise to Mr. Bilby?

By Mr. Skinner: Objected to as incompetent, irrelevant and immaterial and leading.

By the Court: Objection overruled.

By Mr. Skinner: Contestants except.

By the Witness:

A. He did.

By Mr. Moffitt:

30 Q. You may state to the jury what he told you?

A. He stated to me that he had known Mr. Bilby for some years, and that Mr. Bilby had been kind and friendly and helpful to him for a good while, for a number of years, and that he had but little property except the allotment that he received from the Government from the Creek Nation—and that he wished Mr. Bilby to have that when he, Waco Bruner, died. He wished him to have the part of it that he had described in the will. I don't remember now whether all of this allotment was described in the will or not, but he wished Mr. Bilby to have the portion that is described in his will, as set over to Mr. Bilby. He also said that he had no near relatives, and that the disposition he was making of his estate and will was satisfactory to him, and he desired it to go that way.

By Mr. Moffitt: That is all.

Cross-examination.

By Mr. Skinner:

Q. He used that language did he?
A. I could not say that he used it word for word.
Q. But it is about what he used?
A. Yes sir, it is about what he used.
Q. Do you have a distinct recollection of that Indian, Judge?
A. Yes, sir, I remember the time.
Q. How was his voice?
A. He had a poor voice.
Q. Did you testify in the County Court in this case?
A. I did.
Q. Didn't you testify that you had no recollection of any defect in his voice?
A. I don't think I said that.
Q. Didn't you state that you had no recollection of his talking in a whisper in answer to a series of questions from Judge Bailey?
31 A. Yes sir, I said about that.
Q. How many of these wills, if you know, have you approved as United States Commissioner?

By Mr. Moffitt: Objected to as incompetent, irrelevant and immaterial.
By the Court: Objection sustained.
By Mr. Skinner: We except.

By Mr. Skinner:

Q. Have you ever disapproved of any of them?

By Mr. Moffitt: Objected to as incompetent, irrelevant and immaterial.
By the Court: Objection sustained.
By Mr. Skinner: Defendant Excepts.

By Mr. Skinner:

Q. Isn't it a fact that just a few days ago, at the suggestion and request of Mr. Moffitt, who offices with you, that you and he went to Yeager, and that you approved and had witnessed a will devising the estate of an Indian girl away from her father.

By Mr. Moffitt: Objected to as incompetent, irrelevant and immaterial.
By the Court: Objection sustained.
By Mr. Skinner: We except.

By Mr. Skinner:

Q. Was there any defect in his voice?
A. I think there was.
Q. Do you remember that now?
A. Yes sir.
32 By Mr. Skinner: That is all.

Witness excused.

33 JAMES A. LONG, a witness produced, sworn and examined on behalf of the proponent testified as follows, to-wit:

Direct examination.

By Mr. Moffitt:

Q. State your name?
A. James A. Long.
Q. Age?
A. Fifty.
Q. Place of residence?
A. Wetumka.
Q. Occupation?
A. Lawyer.
Q. How long have you been a lawyer?
A. I was admitted in 1888, twenty-five years ago.
Q. How long have you lived in Hughes County?
A. Twelve years nearly, in what is now Hughes County.
Q. Did you know Waco Bruner in his life time?
A. I met him once I believe during his life time. I did not know him well.
Q. Do you remember about when?
A. About two years ago.
Q. And where?
A. In your office,—in the office of Moffitt in Holdenville.
Q. Under what circumstances did you meet him there that day?
A. I was in there on some business with you that I had there, that was not connected with this, and I was requested to sign a paper as a witness.
Q. I hand you a document the Stenographer has marked Exhibit One. I will ask you to examine it and state what it is?
A. (Witness examines exhibit) That is the last will and testament of Waco Bruner.
Q. Did you sigh that as a witness?
A. I did.
34 Q. At whose request?
A. At his request.
Q. At the request of Waco Bruner?
A. Yes sir, at the request of Waco Bruner.
Q. In his presence?
A. In his presence, and also in the presence of John R. Dutton.
Q. Did Waco Bruner at that time declare the instrument to be the last will and testament?

By Mr. Skinner: Objected to as suggestive and leading.
By the Court: Objection sustained as leading.

By Mr. Moffitt:

Q. Question withdrawn. What declaration, if any, did Waco Bruner make at that time—at the time the will was executed about the will?
A. He said that was his will and wanted us to sign it as witnesses.

Q. Did you — a conversation with him there at that time?
A. I did, before Mr. Dutton came in.
Q. In whose presence—State to the jury if you will, Mr. Long, the circumstances under which you talked to Waco Bruner and the conversation had with him?
A. I was in the large room and there was some one in another room, when they asked me in Mr. Moffitt and this Indian were in Mr. Moffitt's private room. When they told me their business I asked Mr. Moffitt to step out and I had a talk with this Indian about this will, and he told me he was making it and I asked him why and who to, and if he knew he did not have to make a will unless he wanted to, and I said I had rather not be a witness to this will, and he said if you don't want to sign it I will get somebody else, and I asked him about its contents, and asked him about my reading it, and I learned from him he had no wife, no relatives and wanted some one to sign the paper, and I, at his request, I wrote his name on it.
35 Q. I will ask you whether or not you read that document over to Waco Bruner during that conversation and while I was out of the office in the other room?
A. As to whether I read it aloud to him or not I could not say. I am pretty sure of one thing, I read it, as to whether I read it aloud or not I don't know.
Q. In your conversation did you talk to him in English?
A. Yes sir, I talked to him in English.
Q. Did he speak English?
A. Yes, sir, altogether.
Q. Did he speak good English?
A. Easily enough, but in a whisper. He seemed to have practically no voice. He spoke accurately enough but no voice at all to speak of.

By Mr. Crump: May it please the Court we ask that the answer be stricken as not responsive.
By the Court: Objection overruled.
By Mr. Crump: We except.

By Mr. Moffitt:

Q. Did he explain to you about his loss of voice?
A. He did not, I did not ask him and he did not explain it.
Q. In that conversation that you had with him there at that time, did he tell you why he was making Bilby the beneficiary under this will?

By Mr. Crump: Objected to as leading.
By the Court: Objection overruled.

By the Witness:

A. He told me that Bilby had kept him up for a number of years, it might have been that he said five, or it might have been
36 six or seven years, and Bilby had always been his friend and what he had he wanted it to go to Bilby, that no one else

would not give him anything, and that he could get money and things of that kind from Bilby too.

By Mr. Moffitt:

Q. I will ask you if in that conversation did he tell you whether or not he had any near relatives?

By Mr. Skinner: Objected to as a repetition.

By the Witness:

A. My understanding was he had no wife and no children.

By the Court: Objection sustained.

By Mr. Moffitt:

Q. Mr. Long, I will ask you to state if in your opinion whether or not at that time that will was executed Waco Bruner was of sound or unsound mind?

By Mr. Skinner: Objected to as incompetent, irrelevant and immaterial.
By the Court: Objection overruled.

By the Witness:

A. I thought the man was in his right mind.

By Mr. Crump: Object to what he thinks it is and ask that it be stricken.
By the Court: I think that is practically saying he is.

By the Witness:

A. The man was in his right mind if we are.

By Mr. Moffitt: That is all.

Cross-examination.

By Mr. Skinner:

Q. Did you ever see him before?
A. No, sir.

37 Redirect examination.

By Mr. Moffitt:

Q. I will ask you to state to the Court and jury, Mr. Long, why it was that you did not want to witness this will when Waco Bruner first asked you to?

By Mr. Skinner: Objected to as incompetent, irrelevant and immaterial and a repetition.
By the Court: Objection overruled.
By Mr. Skinner: Contestants except.

By the Witness:

A. Well, I had been employed by a good many others and opposed

the probate of wills of this kind, and I did not want to appear in the probate of a will, especially when a Creek Indian had signed it.

By Mr. Skinner: We object to that and ask that the answer be stricken as incompetent, irrelevant and immaterial.

(No ruling).

By Mr. Moffitt:

Q. Did you satisfy yourself that this was free from undue influence?

By Mr. Crump: Objected to as incompetent, irrelevant and immaterial and gives a conclusion.

By the Court: Objection sustained.

By Mr. Moffitt: We except.

By Mr. Moffitt: That is all.

Cross-examination:

By Mr. Skinner:

Q. You never saw him before, Mr. Long? This Indian before?

38 A. No sir.

By Mr. Skinner:

Q. Nor had not seen him since?

A. I could not say whether I have seen him since or not.

Q. If you did, don't you remember of seeing him?

A. I never had any conversation with him, I think I have seen the same man since.

Q. Do you have any distinct recollection of seeing him?

A. I think I talked with him here one time.

Q. About how long did you talk to him?

A. About twenty-five or thirty minutes.

Q. Do you have a distinct recollection of his saying all the things you say he did?

A. Yes sir, that is the substance.

Q. Talked in a whisper?

A. Yes sir.

Q. Was his language good?

A. It was not good English, but such as Indian- who are educated use.

Q. In other words, he whispered broken English?

A. Yes sir.

Q. He appeared to be what, an American or Mexican?

A. No sir, an Indian.

Q. Did he appear to be a *b*ull-blood?

A. Yes sir.

Q. About what age?

A. About forty or forty-five.

Q. You did not know under what circumstances he came there at all?

A. No sir.

Q. You don't — what sent him there or whether lungs affected him?
A. No sir, I don't know.
Q. You found him—he was in Moffitt's office?
A. I can't say whether he was in there when I went in or not.
Q. Was there any other Indians around?
A. No sir.
39 Nobody there but white men?
A. Mr. Moffitt and this Indian were in a little room when my attention was called.
Q. You don't know what had been said when Mr. Moffitt got hold of him?
A. No sir.

By Mr. Skinner: That is all.

Redirect examination.

By Mr. Moffitt:

Q. Who signed his name to that instrument?
A. I did.
Q. At his request?
A. Yes sir, and so wrote it at the time.

By Mr. Moffitt: That is all.
Witness excused.

40 J. R. DUTTON, a witness produced, sworn and examined on behalf of the Proponents testified as follows, to-wit:

Direct examination.

By Mr. Moffitt:

Q. State your name?
A. J. R. Dutton.
Q. Age?
A. Forty.
Q. Residence?
A. Holdenville.
Q. Occupation?
A. Druggist.
Q. Did you know Waco Bruner in his life time?
A. Yes sir.
Q. Did you see him on or about the 18th day of March, 1911?
A. Yes sir.
Q. Where?
A. In your office.
Q. State to the jury the circumstances under which you saw him there that day?
A. Mr. Moffitt telephoned me to come up to his office and I went up there and Mr. Bruner and Mr. Long and yourself were in the office and he was making his will he told me to Mr. Bilby and wanted me to witness the will.
Q. Did he ask you to witness the will?

A. Yes sir.

Q. I hand you a document the Stenographer has marked Exhibit One and ask you to examine it and state whether or not that is the document you witnessed there that day as his will?

A. (Witness examines exhibit) Yes sir, it is the document.

Q. Is that your signature there, J. R. Dutton? (Pointing out on document).

A. Yes sir.

41 Q. Did you sign that in the presence of Waco Bruner?

A. Yes sir.

Q. And also in the presence of James A. Long?

A. Yes sir.

Q. At his request, that is at the request of Waco Bruner?

A. Yes sir.

Q. Did he at that time declare that instrument to you and those present to be his last will and Testament?

By Mr. Skinner: Objected to as leading and suggestive to the answer.

By the Court: I think he signed it as witness, it contains those things and the will itself is the best evidence. Objection sustained.

By Mr. Moffit: We except.

By Mr. Moffit:

Q. Were you present there when the will itself was executed?

A. When he wrote the will up?

Q. No, when it was signed?

A. Yes sir.

Q. If you remember, who signed Waco Bruner's name to the will?

A. Mr. Long, as well as I remember.

Q. Did he, Waco, request him to sign it?

A. Yes sir.

By Mr. Crump: Objected to as leading, and ask that it be stricken.

By the Court: Objection overruled.

By Mr. Crump: We except.

By Mr. Moffit:

Q. I will ask you to state whether or not you hear- Waco Bruner at the time this will was executed make any statement about how he was disposing of his property and if so, tell the jury what it was?

A. Mr. Bruner said that Mr. Bilby had been taking care of him, furnished rations and stuff to live on, and wanted him to

42 have his land when he died. From what I connected from his evidence he was living probably by himself and no one else taking care of him but Mr. Bilby.

Q. Did he in that conversation tell you or anyone in your presence whether or not he had any immediate relatives?

By Mr. Crump: Objected to as leading.

By the Court: Objection overruled.

By the Witness:

A. I can't say whether he did or not.

By Mr. Moffitt:

Q. When you came into the office there that day, who was present?

A. Mr. Long, Mr. Bruner and yourself.

Q. And what did Mr. Bruner say to you in relation to that instrument you hold in your hand?

A. He said that this was his will that he was making to Mr. Bilby and wanted me to witness the will.

By Mr. Moffit: That is all.

Cross-examination.

By Mr. Skinner:

Q. You have a distinct recollection of that do you?

A. Yes sir.

Q. That was the words he used?

A. Yes sir.

Q What time of day was it that you were notified to come up there?

A. I don't remember that.

Q. How was he dressed?

By Mr. Moffit: Objected to as incompetent, irrelevant and immaterial.

By the Court: Objection overruled.

43 By Mr. Moffit: Plaintiff excepts.

By Mr. Skinner:

Q. How was Mr. Bruner dressed?

A. Well, he had on a dark suit of clothes.

Q. Coat and vest?

A. He had on a coat and I don't know whether he had on a vest or not.

Q. What kind of hat did he have on?

A. I don't know.

Q. Did he have on boots or shoes?

A. I don't know.

Q. Who first spoke when you went in the room, Mr. Bruner or you?

A. I believe Mr. Moffit spoke first.

Q. What did he say?

A. He asked me—told me Mr. Bruner telephoned me to sign this will, and ask- me to meet Mr. Bruner.

Q. Everything was moving for Mr. Bruner was it?

A. Yes sir, that is the way it seemed.

Q. Mr. Bruner wanted you to witness the will?

A. Yes sir.

Q. Now you have a distinct recollection that Mr. Bruner wanted you to witness the will?
A. Yes sir.

By Mr. Moffit: We object to that.
By the Court: Objection overruled.
By Mr. Skinner: That is all.

Redirect examination.

By Mr. Moffitt:

Q. In your opinion at the time this will was executed was Waco Bruner of sound or unsound mind?

By Mr. Skiner: Objected to as incompetent, irrelevant and immaterial and improper redirect examination.

44 By the Court: Objection overruled.

By Mr. Skinner: Defendant excepts.

By the Witness:

A. He seemed to be.

By Mr. Moffitt:

Q. His mind was perfectly clear and held his h d?
A. He talked to me that way.
Q. Did you ever see him before that time?
A. No sir.
Q. Did you ever talk to him after that?
A. Never did.
Q. Did you talk to him after that?
A. No sir.
Q. How long did you talk to him when you signed the will?
A. About three minutes.
Q. What was said?
A. Just what I said awhile ago.
Q. And that was all that was said?
A. Yes sir.
Q. And from that your opinion is that he was of sound mind?
A. Yes sir.

By Mr. Moffitt: That is all.

Witness excused.

45 H. B. MOFFITT, A witness produced, sworn and examined on behalf of the proponent testified as follows:

Direct examination.

By Mr. Lawson:

Q. What is your name?
A. H. B. Moffitt.
Q. What is your age?

A. Thirty, and I reside at Holdenville?
Q. How long have you lived in Holdenville?
A. About five years.
Q. Did you know Waco Bruner in his lifetime?
A. Yes sir.
Q. I will hand you Exhibit marked One, state whether or not you ever saw that before; if so, where and under what circumstances?
A. I have seen it before. I first saw this instrument on the 18th day of March, 1911. It is the last will and testament of Waco Bruner and is in my handwriting.
Q. Where was it executed?
A. In my office at that time on that date.
Q. How come you at that time to execute or write that will for Waco Bruner and at whose instance and request?
A. Waco Bruner came to my office on that day as well as I remember, of that day in the afternoon, and asked me to write his will and I took him in the private room to my office and talked to him for an hour or more relative to the provision and disposition that he was to make of his property. At that time he gave me a complete history of his life as well as he could. I asked him to do so, and in that conversation he told me that he had no father and no mother and no brothers or sisters; that he had never been married; and that he had no children. He told me he wanted Albert Stewart to be paid $10.00 out of his estate after he died, and he
46 told me he wanted Lucy Stewart to be paid the same amount, and that he wanted Ben Reed——(interrupted.)

By Mr. Crump:

Q. Can you remember that without looking at the will?
A. Yes sir.

By Mr. Crump:

Q. I wish you would do that.

By the Witness: (continuing.)

That he wanted Ben Reed to have $5.00, and that he wanted the balance of his property, which consisted of his allotment to go to Mr. N. V. Bilby, and he told me in that conversation that any of his people did not care for him; that he had no place to stay; that he had no home; that he stayed among his own tribe of people around one place and another, but that Mr. Bilby had furnished him with food and clothing for several years previous thereto, and that he thought it was right and fair and just that Mr. Bilby should have this land after he died because his own relatives, the nearest he had never did anything for him, and that he did not feel that they were entitled to any of his property. Under his directions and as he told me I wrote this will. It is in my handwriting and after I had written it, I read it over to him and asked him if that was according to the way he wanted his property to be disposed of and he told me it was, and I told him it would be necessary for this will to be valid to have it witnesses by two parties. He asked me if I

would get two men to witness it for him and I telephoned to—I first asked him if Mr. Dutton that was druggist in the same building would be satisfactory to him and he said yes, I would like to have him, and on or about that time Mr. Long came in to the office and I asked him if Mr. Long would be all right and he said he would.

By Mr. Lawson:

Q. What Long was that?

A. James A. Long, the witness that was on the stand. And they were called into the office and Waco Bruner wanted them to
47 witness his will which they did, and he executed it by mark there in the presence of those two witnesses, and they witnessed it in his presence and in the presence of each other.

By Mr. Lawson:

Q. Did he tell Mr. Long and Mr. Dutton what the instrument was?

A. Yes sir.

Q. What did he say it was?

A. His last will and testament.

Q. What was the condition of his mind at that time?

By Mr. Crump: Objected to as incompetent, irrelevant and immaterial, not being an expert. I believe I will withdraw it.

By the Witness:

A. His mind was apparently as clear as a whiteman's as near as I could tell you.

By Mr. Lawson:

Q. Who came up there with Waco Bruner?

A. I don't remember that anyone came with him.

Q. Had there been a previous arrangement between you and Mr. Bruner about writing that will?

By the Witness:

A. There had not.

By Mr. Lawson:

Q. Did you know anything about it before he came there?

A. I did not.

Q. About what age was Waco Bruner?

A. I would judge him to be about forty five years old.

By Mr. Lawson: That is all.

Cross-examination.

By Mr. Crump:

Q. Pretty good talker was he for a man pretty near dead with consumption?

A. It seemed from his whisperings he had lost his voice—
48 he told me he had lost his voice he told me from some disease ten or fifteen years prior to that, aside from that he talked fairly good English.

Q. He said he thought it was right and fair and just did he that Bilby should have this land?

A. Yes sir, he said he thought it was fair and just.

Q. Did he make any *jestures*?

A. No sir, I don't think he did.

Q. Did he get up on a box to make you that speech?

By Mr. Lawson: Objected to as incompetent, irrelevant and immaterial and impertinent.

By the Court: Objection sustained.

By Mr. Crump:

Q. Did he stand up *for* sit down to make that statement?

By Mr. Lawson: Objected to as incompetent, irrelevant and immaterial.

By the Court: Objection sustained.

By Mr. Crump:

Q. You said he got in there about what time?

A. I don't remember, it was after dinner that day.

Q. You are Dutton's lawyer?

A. No sir, I never have acted as his attorney that I remember of.

Q. You have advised him when he had cases on his folks?

By Mr. Lawson: Objected to as incompetent, irrelevant and immaterial.

By the Court: Objection sustained.

By Mr. Crump: We except.

By Mr. Crump:

Q. This is the first time you represented Bilby?

49 By Mr. Lawson: Objected to as incompetent, irrelevant and immaterial.

By the Court: The fact that he.—that this may be the first time or last time he has represented the client does not have anything to do with the case, objection sustained.

By Mr. Crump: We except.

By Mr. Crump:

Q. And your office was with Judge Fawcett, the man who approved the will?

A. Yes sir.

Q. And Judge Fawcett said you would have to get somebody to sign it?

A. I don't know whether he did or not.

Q. And Waco Bruner gave you his family history?

A. He did.

Q. And all the names?
A. I did not hear him.
Q. Did he have it wrote down in a book?
A. No sir.
Q. He told you he had been wandering for thirty-five years from place to place and did not have sense enough to make a living?
A. No sir, he did not tell me that.
Q. And that Bilby kept him up?
A. He told me that Bilby had furnished him clothes for several years.
Q. You say that he was poorly?
A. No sir, I said from his voice he seemed to be weak.
Q. He did not have any voice at all and talked in a whisper didn't he.
A. He talked in a whisper.
Q. Just give an imitation of his voice to the jury, they want to hear it?
A. I am not a very good imitator.
Q. You sing sometimes don't you on the stage?
A. No sir, not on the stage.
50 Q. You sing don't you?

By Mr. Lawson: Objected to as incompetent, irrelevant and immaterial.
By the Court: Objection sustained.

By Mr. Crump:

Q. Will you imitate his voice?
A. I don't think I could imitate his voice.
Q. Well, will you do the best you can?
A. No sir, because I cannot imitate it, if I could I would not mind doing it.
Q. You will not make an effort to imitate that Indian will you?
A. The best I can tell you, he talked partly in a whisper.
Q. Did you have to get close to hear?
A. Yes sir.
Q. You had to get right up to him and he sat by you in a chair?
A. No sir, I sat four or five feet away from him.
Q. Across the table?
A. No sir, I was sitting at my table and he was across the desk.
Q. He came in and said good morning (whispering) did he?
A. No sir.
Q. The next thin*k* he said "I think it is right and fair that Bilby have the property" did he?
A. No sir.
Q. Pitiful looking *b*ullblood Indian, was he?
A. He looked to be a full blood Indian, but aside from that he was not pitiful looking.
Q. He told you he did not have a dime outside of this allotment did he?
A. He told me that he did not have any personal property.
Q. And this was all the real estate that he had?

A. All that he knew of.
Q. He did not tell you that he had been living first with this one and on around then with another part?
51 A. He told me he stayed occasionally with his brother.
Q. That he had no home with his relatives?
A. No sir, except with his own tribe of people.
Q. Did he tell you that Bilby had a will on this property?
A. He told me that Bilby did not want that that day.
Q. Did he tell you that Bilby had had another will besides this one?
A. No sir.

By Mr. Lawson: Objected to as improper cross examination.
By the Court: Sustained.
By Mr. Crump: We except.

By Mr. Crump:

Q. Did he tell you that Bilby had had his allotment in possession for the last eight or ten years?

By Mr. Lawson: Objected to as improper cross examination.
By the Court: Objection sustained.
By Mr. Crump: We except.

By Mr. Crump:

Q. Did he tell you that he had ever lived at Bilby's home?
A. No sir, he did not tell me that he lived at his home.
Q. Did he ever tell you that Bilby ever visited him?
A. No sir.
Q. Did he tell you that he ever visited Bilby?
A. He told me that he stayed around Bilby's store and gin there.

By Mr. Crump:

Q. And he went out a whispering?
A. I did not hear it.
Q. I say he went out a whispering?
A. No sir, I don't think he was whispering when he left the office.
52 Q. The sweat was popping out on him wasn't it?
A. I don't know.

By Mr. Crump: That is all.
Witness excused.
By Mr. Moffitt: Plaintiff rests.
By Mr. Crump: We desire to demur to the evidence offered on behalf of proponents for the reason it is well established by the pleadings and by statement of counsel that the Testator, Waco Bruner, was a full-blood Creek Indian and so enrolled as such, and for the further reasons it is insufficient either in law or equity of good conscience to admit this will to probate.
By the Court: Demurrer overruled.
By Mr. Crump: Give us an exception.

53 *Request of Proponent to Read Testimony of N. V. Bilby to Jury.*

By Mr. Moffitt: We want to read the testimony of N. V. Bilby to the Jury. No objections being offered, here testimony of N. V. Bilby is read to the jury, which testimony was taken at the former trial of this cause in the county court, which said testimony is in the words and figures, as follows, Viz:

54 N. V. BILBY, being duly sworn, testified as follows:

Direct examination.

By Mr. Moffitt:

Q. State your name?
A. N. V. Bilby.
Q. Age?
A. Aged forty-one, nearly forty-two.
Q. Place of residence?
A. Six miles from Holdenville.
Q. Occupation?
A. Farmer.
Q. Did you know Waco Bruner in his lifetime?
A. I did.
Q. How long had you known him?
A. About ten or eleven years.
Q. Had you been intimately acquainted with him during that time?
A. Yes sir.
Q. Did you know the condition of his voice during the last ten years of his life?
A. Yes sir.
Q. What was it?
A. It was bad; he spoke in a whisper.
Q. Do you know what caused his voice to fail him?
A. He told me in his early boyhood he had the measles and they settled in his throat and ever since that time his voice has been seriously impaired, could hardly speak above a whisper.
Q. Where did he stay during the last ten years of his life?
A. Well, he had no regular place of abode, he stayed at an Indian's across the river, at Party Beaver's, and around over the neighborhood, generally, he stayed over at our place part of the time.
Q. Have you a store or place of business at Wecharty, in this county?
A. Yes sir.
55 Q. Was Waco Bruner around there frequently, during the past ten years?
A. Yes sir, almost every day.
Q. And were you closely associated with him during that time?
A. Yes sir. He acted as interpreter for me, and, Oh, did lots of

things, quite a diplomatic—smoothing over differences and misunderstandings. On one particular occasion there was a stolen plow, and I told some of the Indians I would get after them, and the next day the plow was back in the field; next day I discovered where Waco was, and I went over and explained to him what had occurred, and he had settled with them.

Q. Did he transact business for you frequently, during the past ten years with the other Indians?

A. Yes sir.

Q. Were you acquainted with his mental condition as to competency during the past ten years?

A. Yes sir.

Q. What was his condition?

A. I considered it good, he spoke good English, his physical condition wasn't strong, he wasn't robust man, but his mental condition was above the average; I selected him for that purpose; he could do those things where the others could not, he seemed to have quite a good deal of influence with the Indians and they listened to his counsel.

Cross-examination.

By Mr. Skinner:

Q. Seemed to be rather a prominent Indian?

A. Yes sir.

Q. Seemed to be a good hand to handle the Indians, make trades?

A. Very good to explain matters.

Q. Didn't drink?

A. No sir, I don't think he ever took liquor all his life, that I know of.

Q. Kind of a prohibitionist?

A. Well, I think he was really a tee totaler; I think he
56 was, on that subject, I have heard him express himself at home.

Q. Had no family, though, drifted about over the country, lived with various relatives ever since you have known him?

A. Yes sir.

Q. Never stayed at your house, did he?

A. He was down there a couple of times.

Q. Just chanced?

A. Well, when he did that he come over to the store and would get canned goods.

Q. Now, what property did he have when he wound up his career?

By Mr. Moffitt: Objected to as incompetent, irrelevant and immaterial. Not proper cross examination.

The Court: Overruled.

Q. What property did he have?

A. He had a quarter section of land.

Q. That was all?

A. I think so.

Q. That was allotted to him?
A. Yes sir.
Q. Who is in possession of that land at this time?

Mr. Moffitt: Objected to as incompetent, irrelevant and immaterial, not proper cross examination.
The Court: Overruled.

The Witness:

A. I bought the land first from, I think, from John Arthur, in 1905, if I am not mistaken.
Q. Is it as late as 1905?
A. 1904 or 1905.
Q. You have a lease on it now, extending in the future?
A. A year or two in the future, I think.
Q. Quite a good quarter section of land?
A. No so good.
57 Q. How much in cultivation?
A. Twenty or twenty five acres.
Q. How long has that been in cultivation?
A. I couldn't say, was in cultivation when I went down there.
Q. Been twenty or twenty-five acres in cultivation ever since you have been on it?
A. Yes sir.
Q. That was all he left when he died?
A. So far as I know, yes, sir. Possibly some little personal effects.
Q. Well, what went with his earnings, a man of that intelligence, a good trader, a good man to handle Indians, what went with his earnings.
A. Well, I suppose it went where they all go, he had to live.
Q. Well, he spent his earnings then for a living?
A. Well, I couldn't say what he done with his money.
Q. Well, Mr. Bilby, you say you were intimately acquainted with him and he was at the store there every day?
A. Well, he was at the store there and other Indians would be there at the store, and if he wanted sugar or coffee he would pay for it.
Q. He had the money?
A. Yes sir.
Q. Well, he earned this money?
A. Yes, sir.
Q. Well, he earned this money?
A. Yes sir.
Q. Supported himself?
A. Yes sir, sir.
Q. So far as you know, he supported himself clear up to the time he died, a good business man?
A. Well, not particularly all this time, you might not say he was self supporting, but I paid him lease money.
Q. You paid him lease money?
A. Yes sir.
Q. How much did you pay him on his lease?
A. I think I paid him $50.00 a year.

Q. Your present lease calls for fifty dollars a year?
58 A. I think so.
Q. Well, it didn't take much to support him, did it?
A. No, it didn't take much to support him but the Indians there had a general idea that when one had something they should share it.
Q. You know whether he ever stayed with his aunt, Lucy Scott, any?
A. Not that I know of.
Q. You don't know that he didn't?
A. No, sir, I only know him up during the last ten years.
Q. Well, during that time, do you know whether he had ever stayed with his uncle, Albert Stewart?
A. I couldn't say.
Q. You don't know of any unpleasant relations that he had with his relatives?
A. No, sir.
Q. He never told you of any unpleasantness?
A. Well, he had been roaming around never had any near relatives.
Q. He was a rambler, drifting about over this community, you might call it this community, from place to place, no particular place for a home?
A. He made his headquarters with Party Beaver, he stayed over there.
Q. You run a store down at Wecharty, gin and compress oil mill, and own large and extensive bodies of land?

Mr. Lawson: Objected to as incompetent, irrelevant and immaterial.
The Court: Overruled.
Mr. Lawson: We except.

Witness:

A. I have got some land.
Q. Your principal occupation for the last ten years is taking leases acquiring land?

Mr. Lawson: Objected to for the same reason.
The Court: Overruled.

Witness:

A. My principal occupation is making a living.
59 Q. Answer the question?
A. I think I have.
Q. Hasn't your principal occupation been buying and leasing lands from the Indians for the last ten years?

By Mr. Lawson: Objected to for the same reason.

A. No sir.
Q. How much land have you acquired in this county?

Mr. Lawson: Objected to as incompetent, irrelevant and immaterial, has nothing whatever to do with the probation of this will.
The Court: Overruled.
Mr. Lawson: Proponents excepts.

Witness:

A. Of Indian lands bought principally through the Interior Department and through the county court, I expect I have got about a thousand acres, my principal lands are negroe lands.
Q. Negroe lands?
A. Yes sir. Most of my Indian land has been bought through the Interior Department.
Q. You were an officer here for years and agent of the Indian Land & Trust Company which officed at Holdenville, did you not?

Mr. Lawson: Objected to as incompetent, irrelevant and immaterial.
The Court: Sustained.
Mr. Skinner: We except.

Q. Do you know whether or not any other full blood Indians have ever made you a will?

Mr. Moffitt: Objected to as incompetent, irrelevant and immaterial.
The Court: Overruled.
Mr. Moffitt: We except.

Witness:

A. No, sir, this was the only one.
Q. That you ever took?
A. Yes sir.
Q. You never took any other will, don't know of any now?
60 A. No.
Q. How come this Indian to make you this will?
A. Well, Sir, he came to me about a year or two before he made the will, in fact I saw him practically every day, he told me, I was in the adjoining store at that time, and he used to tell me he wondered what he would do with his land, he told me. He was going to die some day and he wanted to give me the land and said I had been good to him.
Q. He discussed that with you ever- time he talked with you?
A. Not every time.
Q. Nearly every time?
A. I am repeating as nearly as I remember the conversation on this occasion, and I then told him I didn't think he could do that, I didn't think a will was good and he spoke of it at different times, and finally upon such time as I thought a will was legal, he asked me about it and I told him; he asked me what lawyer to get and I told him most any of those lawyers there at Holdenville could do that work for you. And he wanted to know who was a lawyer and I told him Judge Lawson and he came to Judge Lawson, Judge Lawson was busy at the time and sent him to Moffitt, and he went to Moffitt.

Q. Went to see Judge Lawson?

A. Went to see Judge Lawson and Judge Lawson sent him to Mr. Moffitt.

Q. You directed him to Judge Lawson?

A. Yes sir, he asked my attorney and I told him.

Q. Didn't he make another will down there by the store?

A. Not that I know of.

Q. Prior to that?

A. Not that I remember of.

Q. Witnessed by Paul Ross and another man?

A. I don't know. He might have made one to somebody.

Q. You don't know anything about him making one to you?

A. No sir.

61 Q. Did you understand that he was going to will this stuff to you when he come up to Holdenville.

A. Didn't know anything about it except he told me he was going to make a will.

Q. What did you say?

A. He said he was going to leave it to me and I said all right.

Q. You kindly cautioned him, though, to be careful?

A. No, sir, didn't caution him at all.

Q. Didn't have nothing to do at all with talking him into it?

A. No sir, nothing at all, in fact, I never knew he had made it until Mr. Moffitt told me he had made it.

Q. You didn't know anything about the terms of the will except hear say?

A. Well, he told me he made the will; was satisfied he was all right.

Q. Died of consumption?

A. I don't think it was consumption; I think it was a kind of a complication of diseases more than anything else.

Q. Did you see him before he died?

A. I saw him a few days before he died, over at the store, he had a running sore on his leg, his left leg, I don't know what it was caused by, it was a running sore; I remember I gave him several bottles of Peroxide; that seemed to be about the only thing that would stop the sloughing, what that was I couldn't say.

Q. Anything else the matter with him?

A. He had the bad voice that he had always had.

Q. Had consumption, too, didn't he?

A. No, sir.

Q. Wasn't that your judgment about it?

A. I don't think so.

Q. Did you attend his funeral?

A. No.

Q. You knew about his dying?

A. Yes, sir.

Q. Didn't attend his funeral?

62 —. ——.

Q. He had been a great intimate friend, business friend, with you and associated there for years?

A. There were very good reasons for that. The Indians have

their methods of burial, and in a way they rather resent the intrusion of white people. I have discovered that years ago.

Q. You have discovered that from your other Indian's burial?

A. Yes, sir, I furnished him in the way of burial clothes; they had their method and customs and it was a sacred thing.

Q. For that reason you didn't go to the funeral?

A. No sir.

Q. Hated awful bad to hear of his death?

A. Yes, I did, he was a good old man, I believe, honest.

Redirect examination.

Mr. Moffitt.

Q. Did you furnish a casket for his burial?

A. Yes; I did. Albert Stewart come to me, told me that he was dead, and wanted me to furnish him a casket, and I gave him an order for the casket, paid $25.00 for the casket. Furnished a robe and they wouldn't accept the robe, wanter cheaper clothes according to burial customs, wouldn't accept it.

Q. Do you know whether or not John A. Jacobs a witness on the stand here, was interest- in the making of this will?

Mr. Skinner: Objected to as incompetent, irrelevant and immaterial.

The Court: Sustained.

Q. Isn't it true that the opposing counsel in this——

Objected to as incompetent, irrelevant and immaterial.

The Court: Sustained.

Q. Albert Stewart signed a note for that coffin didn't he?

A. I don't know whether he did or not. He didn't sign it for me, I sent a check for $25.00. I have got the cancelled check in my office, I think, or over at the bank. I am not sure about that.

Witness excused.

Proponents rest:

(Proceedings in County Court.)

63 *Sur-Rebuttal of Proponents.*

(In County Court.)

N. V. Bilby, being recalled, testified as follows:

Direct Examination.

Mr. Lawson:

Q. Your name is N. V. Bilby?

A. Yes, sir.

Q. Are you the same N. V. Bilby that was on the witness stand this morning?

A. Yes sir.

Q. Are you acquainted with Albert Stewart, the witness who has just left the stand?

A. Yes sir.

Q. Did you have a conversation with him within the last hour or thereabout, in this city?

A. I did.

Q. Did he tell you, in that conversation, this, or this in substance, that he regarded Waco Bruner a man of ordinary intelligence for an uneducated full blood Indian?

A. That was about the substance. I asked him the question if he regarded Waco a crazy man, he said no. I said "Do you think he has average intelligence for a full blood"? He said: "yes", and I said he didn't consider him bright; he said he didn't consider him a fool. He said he is about the average for an uneducated full blood.

Cross-examination.

Mr. Skinner:

Q. Nobody there but you and Albert. Occurred right over there by the foot of the stairs, going to my office?

A. Yes, sir. It occurred right there, he hadn't started to your office.

Q. Well, he came on up-stairs as you walked across the street, didn't he?

A. Yes sir.

64 Q. When you asked this leading question, when you think so and so, average Indian, and he answered that in intelligence he wasn't no full blood, wasn't bright?

A. No, he said he didn't regard him as bright as some of them, he was uneducated.

Q. He made out a good case as to be up to the standard of average intelligence?

A. Well, that was the way he considered it.

Q. You told him he had promised to help you?

A. He came to me a few days before and told me he would help me.

Q. Well, he is not a bad witness is he, he is truthful?

A. I regard him so, I have known him quite a few years, regard him as a responsible man.

Q. He told the truth awhile ago?

Mr. Lawson: I object to that.

Witness: I think so.

Witness excused.

65 By Mr. Moffitt: We now desire to read the testimony of L. J. Myers to the jury, which was taken at the former trial of this case in the County Court:

By Mr. Skinner:

Q. Is that a transcribed copy of the notes?

By Mr. Moffitt:

A. Yes sir.

By Mr. Skinner: All right.

(Here testimony of L. J. Myers is read to the jury which testimony was taken at the former trial of said cause in the county court which testimony is as follows; viz:

66 L. J. MEYERS, being, a witness called on behalf of the proponents and being duly sworn on oath testified as follows:

Direct examination.

Mr. Moffitt:

Q. State your name?
A. L. J. Meyers.
Q. Age?
A. Fifty-three.
Q. Place of residence?
A. Holdenville.
Q. Occupation?
A. Loafer, right now.
Q. Have you held any official position in Hughes County within the past two years?
A. Yes, sir, that of under-sheriff.
Q. And how long did you hold that position?
A. Two years.
Q. How long have you lived in what is now Hughes County?
A. Why, about thirteen years, I think, right at that.
Q. Did you know Waco Bruner in his lifetime?
A. Waco Bruner during my last term of office?
Q. During his lifetime?
A. Oh, yes.
Q. Maybe you didn't know that he was dead?
A. I didn't know that he was dead, that's news to me.
Q. How long have you known Waco Bruner?
A. About six years.
Q. Under what circumstances did you know him, that is, where were you that you knew him most intimately?
A. I was employed by Mr. Bilby as book-keeper, roust-about at the store down there at Bilby at the time when I first knew him, in fact, I knew him from that time on. I was with Mr. Bilby, I think, about two years.
Q. During that time, Mr. Meyers, did you see Waco Bruner frequently?
67 Yes, sir, every few days.
Q. And did you talk to him every few days?
A. Oh, I talked to him when he came around where I was, yes, sir.
Q. And since you left the employ of Mr. Bilby, have you seen him and talked to him occasionally?

A. I have seen him a few times, but I don't think I have talked to him half a dozen times since I left out there.

Q. From what you have talked to Waco Bruner and what you have seen him would you regard him as competent or incompetent person, mentally competent or incompetent?

A. Why, I would consider him me-tally competent at the time that I knew him, personally, that is, see him every few days. He always appeared that way.

Q. Did you know of him interpreting for Mr. Bilby?

A. Yes sir, frequently.

Cross-examination.

Mr. Skinner:

Q. Interpreting for Mr. Bilby in land transactions?

A. Yes, sir.

Q. You remember with what Indian?

A. Well, no, sir, I don't know that I could name the parties, I couldn't say that, Mr. Skinner.

Q. What kind of a voice did he have?

A. Very weak voice, he always had to whisper, speak fairly above a whisper.

Q. Quite difficult to talk to him on that account?

A. On that account, yes, sir.

Q. Talked broken English?

A. Yes, sir.

Q. You never talked to him about any matter except some simple matter did you?

A. Oh, no, never had occasion to.

Q. He laid around the store?

68 A. Yes sir.

Q. Did you know anything about his habits, whether he worked or not?

A. My understanding is that he worked awhile, but he never worked very much, like all the other Indians.

Q. Did you know where he lived?

A. No sir, I don't know where he lived, I have been to his place.

Q. He lived in a little cabin, close to the store there didn't he?

A. Well, I don't know, he lived close to Little River.

Q. Well, didn't he live in a little cabin close to the store?

A. Well, now, I couldn't say, I think he lived over across the river.

Q. With old Tihoke?

A. Someone like that.

Q. Well, wasn't it also commonly known that he just lived here and there among the Indians, among the country?

A. Well, I don't know, I suppose he had some place to live, I didn't know any difference.

Q. Well, you didn't know that he didn't?

A. No sir.

Witness excused.

69 JOHN A. JACOBS, a witness produced, sworn and examined on behalf of the contestants testified as follows, to-wit:

Direct examination.

Mr. Skinner:

Q. What is your name?
A. John A. Jacobs.
Q. Have you been sworn as a witness in this case?
A. Yes sir.
Q. How old are you?
A. Forty-one.
Q. Where do you live?
A. Near Holdenville.
Q. How long have you lived near Holdenville?
A. Seventeen years.
Q. Mr. Jacobs what nationality are you?
A. Creek.
Q. Creek Indian?
A. Yes sir.
Q. Did you know Waco or Wego Bruner during his lifetime?
A. Yes sir.
Q. Is he living or dead?
A. Dead.
Q. Do you know from what disease he died?
A. No, not exactly, only judging.
Q. How long have you known Wago Bruner?
A. All my life.
Q. About what aged man was he when he died?
A. A man about forty-six years old.
Q. Any relation of yours?
A. Distant relation.
Q. How often did you see him and talk with Waco Bruner prior to his death?

Objected to as too indefinite and too remote.
By the Court: Objection overruled.
By Mr. Lawson: We except.

By the Witness:

A. I can't say. I expect once in two months.

By Mr. Skinner:

Q. Were you well acquainted with him.
A. Yes sir.
Q. Do you know whether or not he was of sound mind?
A. Yes sir.

By Mr. Lawson:

70 Objected to as leading.
By the Court: Objection overruled.
By Mr. Lawson: Plaintiff excepts.

By Mr. Skinner:

Q. Was he of sound or unsound mind?

By the Witness:

A. He was of sound mind.
Q. How was his voice, John?
A. Poor.
Q. Could he talk above a whisper?
A. Just in a whisper.
Q. How was his English when he did whisper?
A. Broken.
Q. Broken English?
A. Yes sir.
Q. Did he have an allotment?
A. Yes sir.
Q. Where is it located?
A. Located in South of Holdenville.
Q. What direction from the town of Bilby down here?
A. West.
Q. How close?
A. A mile.
Q. Who is in possession of that land?

Q. Did you ever hear Mr. Bilby said whether or not Waco Bruner material.

By the Court: Objection overruled.
By Mr. Lawson: Plaintiff excepts.

By the Witness:

A. N. V. Bilby.
Q. Do you know how long he has been in possession of it?
71 By Mr. Lawson: Objected to for the same reason.
By the Court: Objection overruled.
By Mr. Lawson: Plaintiff excepts.

By the witness:

A. Eight or ten years.

By Mr. Skinner:

Q. Did you hear Bilby's testimony in this case in the county Court?
A. Yes sir.
Q. Did he testify there how long he had been in possession of this land?

By Mr. Lawson: Objected to as incompetent, irrelevant and immaterial.

By Mr. Skinner: Question withdrawn. Did you ever hear Mr. Bilby make any statement about how long he had been in possession of Waco Bruner's land?

By Mr. Lawson: Objected to as incompetent, irrelevant and immaterial.

By the Court: Objection overruled.

By Mr. Lawson: Plaintiff excepts.

By the witness:

A. Yes sir.

By Mr. Skinner:

Q. How long did he say he had been in possession?

A. Said something like eight years.

Q. Did you ever hear Mr. Bilby *said* whether or not Waco Bruner was indebted to him or under obligations to him in any way?

A. Yes sir.

72 By Mr. Lawson: Objected to as incompetent, irrelevant and immaterial.

By the Court: Objection overruled.

By Mr. Skinner:

Q. What did he say?

By Mr. Lawson: Plaintiff excepts.

By Mr. Skinner:

Q. What did he *said* about the indebtedness of Waco Bruner to himself, if anything?

A. He said he did not owe him.

By Mr. Moffitt: We object to this unless it is shown that this conversation took place before or after the will or the death of the Testator.

By the Court: Objection sustained.

By Mr. Skinner:

Q. Where did he say it?

By the Witness:

A. In Judge Bailey's Court.

By Mr. Skinner:

Q. Did he swear to it?

A. He was sworn.

Q. He testified to that about two months ago?

A. Yes sir.

Q. Where was Waco Bruner's home?

A. He did not have any home.

Q. Do you know where he stayed, John?

A. He stayed at Pardy Beaver's or Pardy's mother, Mrs. Beaver, and Tom Sewell and Ben Reed's.

Q. Is this lady here his aunt? (Pointing to lady in room.)

A. Yes sir.

Q. Did he ever stay with her any that you know of?
A. Yes sir, and he stayed with my father some of his lifetime.
73 Q. Did you ever know of his staying with Bilby?
A. No sir.
Q. Did you ever hear of it?
A. No sir.
Q. Did he have any immediate family of his own, any wife?
A. No sir.
Q. Just stayed around where you let him?
A. Yes sir.
Q. Did he have any property besides what the Creek Nation deeded to him?
A. No sir.
Q. No occupation, no property, and no place to stay?
A. No sir.

By Mr. Skinner: Take the witness.

Cross-examination.

By Mr. Moffitt:

Q. Isn't it a fact, Mr. Jacobs, that you heard Bilby say while he was on the witness stand that you refer to when this case was tried in the county court that he had supported Waco Bruner for the last eight or ten years; that he had given him clothing, given him money and given him food, didn't you hear him stated that?

By Mr. Skinner: Objected to as incompetent, irrelevant and immaterial. Let him read the testimony into the record.
By the Court: Objection overruled.

By the witness:

A. I did not hear that.

By Mr. Moffitt:

Q. You say that he did not testify to that?
A. I don't believe he did.
Q. Well, will you say that he did not?

By Mr. Skinner: Objected to as a repetition, he said he did not hear it.

74 By the Court: Objection overruled.

By the witness:

A. I did not hear him say that he give him any money.

By Mr. Moffit:

Q. Did you hear him say that he had ever given him any food?
A. No sir, I did not hear him say he had given him any food.
Q. Did you hear him say that he had given him clothing?
A. Yes sir.

Q. You heard him say that he had given him clothing?
A. Yes sir.
Q. You heard all of his testimony there on that day did you?
A. I have heard it said that he let him have clothing.
Q. You heard all of his testimony on that day did you not?
A. Yes sir.
Q. You were right there present and heard everything the witness had to say when he testified on that day did you not? When he testified in this case?
A. Yes sir.
Q. And you were interested and prompting counsel in that trial were you not?
A. Well, I was interested in one way, yes sir.
Q. And you were prompting counsel in the trial in the county court were you not?
A. I do not remember of prompting counsel.
Q. You after employed counsel on the other side in this case did you not?
A. No sir.
Q. You did not have anything to do with employing them?
A. No sir.
Q. Did you hear Bilby testify in the county court,—didn't he say that he had given Waco Bruner money and that he had given him clothing and given him food for the last eight or ten years prior to his death?

75 By Mr. Skinner: Objected to as incompetent, irrelevant and immaterial. There is no dispute about that Bilby let him have some clothing.

By Mr. Crump: I want to make this objection: It is incompetent, irrelevant and immaterial, and for the further reason that Mr. Jacobs has already answered the question twice before by saying Mr. Bilby did not say that he ever gave him any money or food but said he let him have some clothing.
By the Court: Objection sustained.
By Mr. Moffitt: Plaintiff excepts.

By Mr. Moffitt:

Q. What interest have you in the result of this case, John?

By Mr. Crump: Objected to as incompetent, irrelevant and immaterial, the witness is not required to answer that unless he denies he has no feeling in it.
By the Court: Objection overruled.

By Mr. Moffitt:

Q. Tell the jury what interest you have in the result of this law suit?

By the witness:

A. I have a contract with one of the supposed heirs to the estate to buy his interest.

Q. In case this will is broken?
A. Yes sir.
Q. Who is that heir?
A. Ben Reed.

By Mr. Moffitt:

Q. And it is true, under the will Ben Reed only gets five dollars does he?

76 By Mr. Crump: Objected to as incompetent, irrelevant and immaterial. The will is the best evidence.
By the Court: Objection sustained.

By Mr. Moffitt:

Q. And it is the same Ben Reed that is mentioned in the will to whom five dollars is given?

By Mr. Crump: Objected to as incompetent, irrelevant and immaterial, not proper cross examination and not the proper way to prove it.
By the Court: Objection overruled.
By Mr. Crump: We except.

By the witness:

A. I don't remember of seeing Ben Reed's name in the will.

By Mr. Moffitt:

Q. Have you ever read the will?

By Mr. Crump: We will admit that it is the same will.

By Mr. Moffitt:

Q. Unless you succeed in breaking this will, or somebody does, you will not get anything out of this will you?

By Mr. Crump: Objected to as incompetent, irrelevant and immaterial.
By the Court: Objection sustained.
By Mr. Lawson: Plaintiff excepts.

By Mr. Moffitt: Unless this will is broken Ben Reed will not inherit any of this real estate will he?

77 By Mr. Crump: Objected to as incompetent, irrelevant and immaterial. It is a conclusion of law for the court.
By the Court: Objection sustained.
By Mr. Lawson: Plaintiff excepts.
By Mr. Moffitt: That is all.

Redirect examination.

By Mr. Skinner:

Q. You say you make a contract with one of the heirs to buy his part if he wins?
A. Yes sir.

Q. If you don't, will that be the end of the contract? There will be no contract?
A. No sir.
By Mr. Skinner: That is all.
Witness excused.

78 ALBERT STEWART, a witness produced, sworn and examined on behalf of the Contestants testified as follows: to-wit:

Direct examination.

By Mr. Skinner:

Q. What is your name?
A. Albert Stewart.
Q. You are a Creek Indian are you Albert?
A. Yes sir.
Q. Where do you live?
A. About six miles south of here.
Q. How long have you lived in this portion of the country?
A. Born and raised here.
Q. How old are you?
A. Fifty-one.
Q. Did you know Waco or Wego Bruner during his lifetime?
A. Yes sir.
Q. Was he a full-blood Creek Indian?
A. Yes sir.
Q. What relation was he to you, if any?
A. Nehpew.
Q. How long have you known him?
A. Ever since he was born I guess.
Q. Is he living or dead?
A. Dead.
Q. When did he die?
A. I don't recollect just when.
Q. He died long about the last of November of December didn't he?
A. Yes sir.
Q. Were you well acquainted with him at the time of his death?
A. Yes sir.
Q. How was his mind?

By Mr. Lawson: Objected to as too indefinite.
By the Court: Objection sustained.

By Mr. Skinner:

79 Q. During the last few years of his life, I will ask you if you were acquainted with the condition of his mind?
A. Yes sir.

By Mr. Lawson: Objected to as incompetent, irrelevant and immaterial, and too remote.

By Mr. Skinner:

Q. Well, I will say the last two years, were you acquainted with the condition of his mind?

By Mr. Lawson: Objected to as incompetent, irrelevant and immaterial.

By the Court: Objection sustained.

By Mr. Skinner:

Q. Mr. Stewart, were you right smart kin to Waco Bruner?
A. Yes sir.
Q. How often did you see him and talk with him?
A. Why, sometimes once a month.
Q. Was he around your house any?
A. Yes sir.
Q. Did he stay there any?
A. Yes sir, once in a-while.
Q. Where was his home?
A. He had none.
Q. Did he ever stay with his aunt here, your sister?
A. Yes sir.
Q. In your opinion what was the condition of his mind during the last year of his life, or two years?

By Mr. Lawson: Objected to as too remote and does not fix the time.

By the Court: Objection sustained.

By Mr. Skinner:

Q. Did you know what the condition of his mind was on or about the 18th day of March, 1911, two years ago?
80 A. Yes sir.
Q. What was it?
A. It was not very good.
Q. Do you know how long he had been of not very good mind?
A. Why, I have known him all his life and it never was very good.
Q. How had he been regarded, if you know, by the people who knew him better and the people with whom he had lived—the Creek Indians, how had he been regarded all his life a man of good mind or not good mind?

By Mr. Lawson: Objected to as incompetent, irrelevant and immaterial.

By the Court: Objection sustained.

By Mr. Skinner:

Q. Mr. Stewart, were you acquainted with the reputation of Waco Bruner's mental condition in the community where he lived in the month of March, 1911?

By Mr. Lawson: Objected to for the same reason. Whoever heard of the general reputation of a man's mind.

By the Court: Objection sustained.

By Mr. Skinner:

Q. You say two years ago he was not of good mind?
A. No sir.

By Mr. Skinner: That is all.

Cross-examination.

By Mr. Moffitt:

Q. Do you have your opinion, when you say he was not of sound mind on the 18th day of March, 1911, upon the fact that he could not talk very good, and that his physical condition was not as good as it might be?

A. No sir.

81 Q. Well, on what do you base your opinion that he was not of sound mind?

A. Well, he was a man that was more like a child or an old woman in place of a man—he was a man that roamed around over the country.

Q. He had no home of his own?
A. No sir.
Q. He had not wife?
A. No sir.
Q. He had no father?
A. No sir.
Q. He had no mother?
A. No sir.
Q. Or brothers of sisters did he?
A. No sir.

Q. And from that fact—from the fact that he had no home and just roamed around as you say from one place to another and did not stay at one place, on that account is that the reason for your saying that?

A. No sir.
Q. What is the reason?
A. He did not act as a man that had good sound sense.
Q. How did he act?

A. Why, a man that had good sound sense he would go to work and try to make something for himself and try to make a living in a different way instead of doing the way he did.

Q. Isn't it a fact that about all of the indians in this country are of unsound mind?

A. I don't know.

Q. They run around a good deal don't they, and not any of them tries to make anything for themselves do they?

A. I don't know about others.

Q. Isn't it a fact that Waco Bruner had as much sense and had made as good as the average ordinary uneducated Indian?

82 A. No sir.

Q. Is that not true?
A. No sir.
Q. He knew where his property was didn't he?

A. I guess so.
Q. And he looked after that himself didn't he?
A. No sir.
Q. Did he lease it?
A. I don't know.
Q. Well, you don't know whether he looked after it himself or not do you?
A. I don't know whether he looked after it himself or not.
Q. As far as you know he looked after his allotment himself did he?
A. I don't know.
Q. Did you tell N. V. Bilby on the day that we had the trial before in the County Court in this case that you thought Waco Bruner was as smart as the ordinary full blood uneducated Indian?
A. No sir.
Q. And didn't you so swear in your cross examination on the trial of this case in the county court? Didn't you admit on your cross examination there Albert, that day tell Bilby that or that in substance?
A. No sir, I don't think I did.
Q. Do you swear that you did not?
A. Yes sir.

By Mr. Moffitt: That is all.

Redirect examination.

By Mr. Skinner:

Q. Bilby tried to fix you over there at the foot of the steps didn't he?

By Mr. Moffitt: We object to that.

By Mr. Skinner:

Q. What did Bilby try to get you to say there Mr. Stewart?

83 By Mr. Moffitt: Objected to as incompetent, irrelevant and immaterial. I did not ask him anything about that.
By the Court: Objection sustained.

By Mr. Skinner:

Q. Did Bilby try to get you to testify to any statement of facts?
A. Yes sir.

By Mr. Moffitt: Objected to as incompetent, irrelevant and immaterial.
By the Court: Objection overruled.
By Mr. Moffitt: Plaintiffs except.

By Mr. Skinner:

Q. What was it?
A. He asked me if Waco Bruner wasn't as smart and intelligent Indian as most of the other full blood Indians.

Q. What did you tell him?
A. I told him no.
Q. He came up here then and asked this question and you told him no again?
A. Yes sir.
Q. And then he got on the stand and swore that you said he was did he?
A. Yes sir.
Q. Where did that conversation take place at?
A. On the corner of the street at the foot of the steps.
Q. And when I walked up he sneaked off didn't he?
A. Yes sir.

By Mr. Skinner: That is all.
Witness excused.

84 LUCY SCOTT, a witness produced, sworn and examined on behalf of the Contestants testified as follows, to-wit:

Direct examination.

By Mr. Skinner:

Q. What is your name?
A. Lucy Scott.
Q. Well, were you ever known as Lucy Stewart?
A. Yes sir.
Q. What relation are you to Waco Bruner?
A. Aunt.
Q. How long have you known him?
A. Ever since he was born.
Q. He had no wife or children; did he?
A. No sir.
Q. Where did he live during his lifetime?
A. From one place to another.
Q. Is he dead?
A. Yes sir.
Q. What did he die with, if you know?
A. Lung trouble.
Q. Was there anything the matter with him besides that?
A. Yes sir, he had a sore leg besides.
Q. Was he a man—Did you know Mrs. Scott, what his mental condition was two years ago? If you know?

By Mr. Moffitt: Objected to as incompetent, irrelevant and immaterial.
By the Court: I believe that is the same question that I sustained an objection to awhile ago. Objection overruled.

By Mr. Skinner:

Q. Did you know what it was?
A. Yes sir.
Q. What was it?

A. Weak mind.
85 Q. Who attended to his business, if you know?
A. He did not have any business to attend to.
Q. Well, somebody put him on the rolls didn't they?
A. Yes sir, his uncle did.
Q. Who filed or selected it?
A. Robert Stewart did.
Q. Do you know whether he ever attended to his business at all?
A. No sir, he didn't.
Q. Is there any improvements on his place? On his land?
A. Yes sir.
Q. Who put them there?
A. Robert Stewart, his uncle.
Q. Brother of Albert?
A. Yes sir.
Q. How come Waco Bruner to get this allotment?
A. His uncle let him have it, just filed on it and give it to him.

By Mr. Skinner: That is all.

Cross-examination.

By Mr. Moffitt:

Q. You say his uncle gave him the land?
A. Yes sir, he filed on this piece of land.
Q. It was given to him by the Government was it not?
A. Yes sir, but he filed on it for him.
Q. Do you know who looked after it for him?
A. Robert did, that is his uncle.
Q. How long has he been dead?
A. He died in 1901.
Q. Well, since that time Waco looked after it himself didn't he?
A. Yes sir, I think he had it leased before he died, maybe Robert, he might had it leased for him.
Q. He had it leased since that time did he?
A. I don't know.
Q. Robert, his uncle, has been dead about 12 years, has he not?
86 A. Ten or twelve.
Q. And since he died he leased that land to Mr. Bilby?
A. I don't know whether since or before.
Q. But Waco leased it to him?
A. Yes sir, I guess so, I don't know who leased it for him.
Q. How often did you see Waco Bruner just prior to his death?
A. Just two weeks before he died.
Q. Where?
A. Here in Holdenville.
Q. Was he at your home?
A. He was at my home and stayed two weeks last September.
Q. That was prior to his death?
A. Yes sir.

Q. And you- name is Lucy Stewart too is it not, formerly known as that?

A. Yes sir.

Q. You are the Aunt Lucy Stewart that Waco Bruner mentioned in the will and gave ten dollars to are you?

A. Yes sir.

Q. You know it is true that Waco had stayed a good deal around Bilby's store?

A. No sir, I don't think he did. I think he stayed with his relatives more than he did him.

Q. He stayed with Party Beaver some too didn't he?

A. Yes sir.

Q. Party is his relative?

A. It is clan kin, belongs to the same clansmen.

Q. He stayed around among his clansmen?

A. Yes sir.

Q. Waco did not have any education did he?

A. No sir.

Q. He spoke English well didn't he?

A. No sir, Broken.

Q. Well he spoke English as well as the ordinary Indian
87 without any education didn't he?

A. It was not plain. I do not speak plain myself, and he spoke more broken than I do.

Q. But he talked so you could understand him?

A. Yes sir, you can understand most any of them.

Q. He talked with intelligence didn't he?

A. No sir.

Q. He talked so you could understand what it was didn't he?

A. Yes sir, but that was not intelligent, you can talk plain and not be intelligent.

Q. You did have a talk to him about this land?

A. Yes sir.

Q. He knew his own relatives didn't he?

A. Yes sir, he did.

Q. He knew what he wanted to do and where he wanted to go?

A. Yes sir.

Q. And he was not physically able?

A. No sir.

Q. He had lost his voice had he?

A. Not plum lost I don't guess, he whispered.

Q. He was not very strong the last few years prior to his death?

A. No sir, he was not very strong.

Q. Isn't it a fact that you base your opinion on the fact that he was not well and had lost his voice that you say he was of unsound mind; and on other physical conditions besides, isn't it a fact that you base your opinion on those statement of facts?

A. No sir.

Q. Well, do you say he was not of sound mind?

A. Well, he was not or he would have had a home or had him a wife, he did not have any home or wife.

Q. You say he was not of sound mind because he did not have a wife or a home?

A. Well, he was not well and when he was well he never did try to marry.

By Mr. Moffitt: That is all.
Witness excused.

88 TOM SEWELL, a witness produced, sworn and examined on behalf of the Contestants testified as follows, to-wit:

Direct examination.

My Mr. Skinner:

Q. What is your name?
A. Tom Sewell.
Q. You are a Creek Indian?
A. Yes sir.
Q. Where do you live?
A. Three and a half miles Southeast of here.
Q. How old are you?
A. Forty-three.
Q. Did you know Waco Bruner during his lifetime?
A. Yes sir.
Q. Is he dead?
A. Yes sir.
Q. Where did he die?
A. At my place.
Q. What was the matter with him when he died?
A. I don't know what was the matter, but something was the matter of his breast I guess.
Q. Did you know where Waco had been living for about three or four years?
A. Yes sir, why he lived ever since 1910, he lived down there where I used to live down first on the place and then after 1911 he came to my place upon the hill still North of there and he said he was going to make his home there. He lived there for the last two years—going on two years.
Q. Did he stay there all the time.
A. No sir, very often he would stay there a few days and then go off and stay a week or two.
Q. Do you know whether or not he ever stayed with his aunt Lucy Stewart?
A. I think he did.
89 Q. Do you know whether or not he ever lived with Bilby?
A. No sir, I don't.
Q. Did you ever hear of his living with Bilby?

By Mr. Moffitt: Objected to as hear say.
By the Court: Sustained.

By Mr. Skinner:

Q. Do you know what was the condition of his mind two years ago?

By Mr. Lawson: Objected to as incompetent, irrelevant and immaterial.

By the Court: Objection overruled.

By Mr. Lawson: We except.

By Mr. Skinner:

Q. Answer that yes or no? Do you know what was the condition of his mind two years ago?

A. Yes sir.

Q. What was it?

By Mr. Lawson: Objected to as incompetent, irrelevant and immaterial.

By the Court: Objection overruled.

By Mr. Lawson: Plaintiff excepts.

By the Witness:

A. He was a kind of a whispering you know, and he kinder looked like he did not have the mind that people ought to have used language, and like the rest of them he did not have quiet way, he had good sense but did not use it the right way.

Q. If he had good sense he did not use it?

By the witness:

A. No sir.

Q. Now, you knew him all his life?

A. Yes sir.

90 Q. Now, from what you know of Waco Bruner, was he capable in your judgment of transacting business, signing papers and taking care and tending to his affairs himself?

By Mr. Moffitt: Objected to as incompetent, irrelevant and immaterial.

By the Court: Objection sustained.

By Mr. Crump. We except.

Q. Do you know what the reputation was as to having sound or unsound mind in the community where he lived at the time of his death for the last two years?

By Mr. Lawson: Objected to as incompetent, irrelevant and immaterial.

By the Court: Objection sustained.

By Mr. Skinner: Defendant excepts. That is all.

Cross-examination.

By Mr. Moffitt:

Q. Did you say Waco lived at your house for awhile?

A. Yes sir, he lived at my house for a while.

Q. Died there did he?

A. Yes sir.
Q. How long had he been at your house when he died?
A. I thin- he was there about three weeks before he left there. He left there one week and came here to town and across the railroad and taken sick there.
Q. You went over and brought him back did you?
A. No sir, Party brought him to my place.
Q. And he was there only a few days when he died?
A. He died the next day.
Q. Two years ago what was the condition of his health?
A. His health?
Q. Yes?
A. He had a sore shank, he was suffering from it.
Q. He whispered too, did he?
A. Yes sir.
91 Q. And been whispering for about twelve or fifteen years hadn't he?
A. I don't know exactly how long.
Q. And was not very strong physically?
A. No sir, very weak, never did a good day's work I don't expect.
Q. Isn't it a fact on that account of his whispering and on account of being weak physically and had this sore shank, as you call it, that you say his mind was not very strong?
A. Yes sir.

By Mr. Moffitt: We move to strike out all the evidence of this witness on the question of the mental condition of the Testator two years ago.

By the Court: I think that goes to the credibility of the witness. I will reserve by ruling on that at this time.

By Mr. Crump: The contestants now request to have J. D. Boxley and J. R. Witty sworn for the reason that we have just now ascertained that they were competent witnesses in the case.

By Mr. Moffitt: To which the proponents object for the reason that they have been right here in the Court room all the time and heard what the witnesses have said.

By the Court: Objection sustained.

By Mr. Crump: We except to the ruling of the court.

By Mr. Moffitt: Does the Court hold that I am not entitled to a ruling on my motion to strike the testimony of this witness.

By the Court: I reserve my ruling at this time.

"Cross-exm. Cont."

By Mr. Moffitt:

Q. You are the same Tom Sewell that filed a purported will of Waco Bruner in this case when it was in the County Court are you?

92 By Mr. Crump: Objected to as incompetent, irrelevant and now proper cross examination.

By the Court: Objection overruled.

By Mr. Crump: Defendant excepts.

By Mr. Moffitt:

Q. You are the same Thomas Sewell that filed a will in this case in this court purported to be the last will and testament of Waco Bruner willing his property are you?
A. Yes sir.
Q. You filed this will?
A. Yes sir.
Q. That will was purported to have been made about two months before he died was it?

By Mr. Skinner: Objected to as incompetent, irrelevant and immaterial, and not proper cross examination.
By the Court: Objection overruled.
By Mr. Skinner: We except.

By the witness:

A. The 15th of October.
Q. When did he die?
A. The 20th day of November.
Q. He was of sound mind all right at the time this will was purported to have been executed was he?
A. He had a sore shank.
Q. I know, he was all right up until he died?
A. He had a weak mind and whispered and could not understand him—could not hardly understand him.
93 Q. He always did have a sound mind did he?
A. I could not understand him good.

By the Court: That is all, that is enough along that line.

Redirect examination.

By Mr. Skinner:

Q. You withdrew the will out of the county court didn't you?
By Mr. Moffitt: Objected to as incompetent, irrelevant and immaterial. The record in the best evidence.
By the Court: Objection overruled.
By Mr. Moffitt: Plaintiff excepts.

By Mr. Skinner:

Q. Were you at this funeral?
A. Yes sir.

By Mr. Lawson: Objected to as incompetent, irrelevant and immaterial and not proper redirect examination.
By the Court: Objection sustained. At this time the motion of the proponents to strike the evidence of the witness as to mental capacity, condition of mental capacity sustained.
By Mr. Skinner: To which the defendants except.
That is all.
Witness excused.

94 WILLIE CORNELL, a witness sworn, profused and examined on behalf of the contestants testified as follows, to-wit:

Direct Examination.

By Mr. Skinner:

Q. What is your name?
A. Willie Cornell.
Q. Are you an Indian?
A. Yes sir.
Q. How old are you?
A. Thirty-nine years old.
Q. How long have you lived in this country, Willie?
A. All my life.
Q. How long have you known Waco Bruner?
A. All my life.
Q. Is he living or dead?
A. He is dead.
Q. Were you at his funeral?
A. Yes sir.
Q. Was N. V. Bilby there?
A. No sir.

By Mr. Moffitt: Objected to as incompetent, irrelevant and immaterial.
By Mr. Skinner: Question withdrawn.

Q. Did you know what was the condition of the mind of Waco Bruner two years ago?

By Mr. Moffitt: Objected to as incompetent, irrelevant and immaterial.
By the Court: I believe I will sustain that objection.
By Mr. Skinner: We except.

By Mr. Skinner:

Q. How often did you see Waco Bruner before his death?
A. I say about month or couple of weeks apart.
95 Q. How often did you see him, say the last three years of his life?
A. Oh, I seen him maybe two weeks apart maybe.
Q. Were you any a kin to him?
A. Yes sir.
Q. Did he ever live with you?
A. No sir.
Q. Was he ever at your house any?
A. Yes sir.
Q. In your opinion two years ago was he of sound or unsound mind?

By Mr. Moffitt: Objected to as incompetent, irrelevant and immaterial.
By the Court: Objection overruled.
By Mr. Moffitt: We except:

By the Witness:

A. Well, he never was real sensible man.

By Mr. Skinner:

Q. Answer the question. Was he of sound or unsound mind?

By Mr. Lawson: Objected to as a repetition. The witness has answered it.

By the Court: Objection overruled.

By Mr. Lawson: Plaintiff excepts.

By the Witness:

A. It was not real sound.

By Mr. Skinner: That is all.

Cross-examination:

Q. He had good sense didn't he Willie?

A. Not much.

Q. Had enough sense to come in out of the rain didn't he?

A. Of course, yes sir.

Q. Knew where his own land was did he?

96 A. Yes sir.

Q. And rented his own land did he?

A. I expect so, I don't know whether he did or not.

Q. Isn't it a fact that he was just about as smart as the ordinary full blood uneducated Indian?

A. No sir, he was not.

Q. When you say that he was not of sound mind isn't it true that you mean that he was not as smart as some of the other Indians in the country, but that he was not crazy, was he?

A. I could not call it crazy, I don't know what you would call it. Sometimes I called it idiot. I don't know what I would call it.

Q. He handled all of his own affairs?

A. I guess he did, he did not have much to handle.

Q. He had a hundred and sixty acres of land didn't he?

A. Yes sir.

Q. What ever handleing was done to it he handled it didn't he?

A. I expect he did.

Q. Did he ever stay at your house?

A. No sir.

Q. He went there sometimes didn't he?

A. He was there, did not stay there.

Q. Is he a relative of yours?

A. Yes sir, first cousin.

Q. Are you one of the contestants in this case?

A. Yes sir.

Q. Unless this will is broken you will not get anything will you?

By Mr. Crump: Objected to, it calls for a conclusion of the witness.

By the Court: Objection sustained.
By Mr. Moffitt: We except.
That is all.

97 Redirect examination.

By Mr. Crump:

Q. For the last ten years Mr. Bilby has been handleing all the property Waco owned hasn't he?
A. Yes sir.
Q. And had been in possession before Waco died?
A. Yes sir.
Q. Bilby got all the property while he was living and now wants it since he is dead?

By Mr. Moffitt: Objected to as incompetent, irrelevant and immaterial.
By the Court: Objection sustained.
By Mr. Crump: That is all.

Witness excused.

98 HENRY KAASE, a witness produced, sworn and examined on behalf of the Contestants testified as follows, to-wit:

Direct examination.

By Mr. Skinner:

Q. What is your name?
A. Henry Kaase.
Q. Where do you live?
A. At the edge of Town.
Q. How long have you lived here.
A. In this Country?
Q. Yes?
A. Twenty-seven years.
Q. How old are you?
A. Forty-eight.
Q. Did you know a man in his lifetime named Waco Bruner?
A. Yes sir.
Q. What nationality was he?
A. Indian.
Q. Were you acquainted with him?
A. Yes sir, I knew him twenty-four or five years.
Q. Where did you get acquainted with him at the beginning?
A. When I first got acquainted with him he was staying with Little Charley twenty-four or twenty-five years ago, and I lived beyond across little river beyond him.
Q. Have you ever stayed with him?
A. He has been at my house.
Q. I will ask you in your opinion was he two years ago a man of sound or unsound mind?

By Mr. Moffitt: Objected to as incompetent, irrelevant and immaterial.

By the Court: Objection overruled.

By Mr. Moffitt: Plaintiff excepts.

99 By Mr. Skinner:

Q. In your opinion, say two years ago, was he of sound or unsound mind?

A. No sir, he did not have good sense.

Q. Did he ever have good sense; since you knew him?

A. No sir.

By Mr. Skinner: That is all.

Cross-examination.

By Mr. Moffitt:

Q. He wasn't crazy was he?

A. No sir.

Q. He knew to get around and look after himself did he?

A. I don't think he did, no.

Q. All the looking he got was what he did himself was it?

A. The people around there helped him a right smart. I used to give him some stuff to wear and shoes to wear.

Q. He looked after his land and rented it didn't he?

A. I don't think he did.

Q. You don't know whether he did or not?

A. I know he did not when I was with him.

Q. You mean that he was not as smart as some of the other Indians and did not try to locate?

A. No sir.

By Mr. Moffitt: That is all.

By Mr. Skinner:

Q. In your opinion would he know the difference between a will and a warranty deed?

By Mr. Moffitt: Objected to as incompetent, irrelevant and immaterial.

By the Court: Sustained because it is not material and incompetent.

By Mr. Crump:

100 Q. Did he pay anything for those clothes and shoes?

By Mr. Moffitt: Objected to as incompetent, irrelevant and immaterial.

By the Court: Objection sustained.

By Mr. Skinner: We rest, your honor.

Witness excused.

101 LLOYD THOMAS, a witness produced, sworn and examined on behalf of the Proponents testified as follows, in rebuttal to-wit:

Direct examination.

By Mr. Moffitt:

Q. State your name?
A. Lloyd Thomas.
Q. Your age?
A. Forty five.
Q. Place of residence?
A. Holdenville.
Q. What official position, if any, do you hold in this county?
A. Deputy District Clerk at the present time.
Q. How long have you held that position?
A. Since the 7th day of January, 1913.
Q. What official position, if any, did you hold prior to that time?
A. County Assessor of this county for 1912.
Q. What official position, if any, did you hold before you were county assessor?
A. Well, I was under-sheriff from 1907 to 1911.
Q. Did you know Waco Bruner in his lifetime?
A. Yes sir.
Q. How long did you know him?
A. Ever since I have been here, perhaps about 15 years.
Q. What business were you in when you first came here?
A. General mercantile business.
Q. Well, in the general mercantile business did you see Waco Bruner frequently?
A. Yes sir, he came in the store frequently.
Q. Would he transact business with you there?
A. Yes sir.
Q. State whether or not you had seen him off and on up until the time of his death?
A. I had.

Q. I will ask you Mr. Thomas, in your opinion was he
102 of sound or unsound mind?

By Mr. Skinner: If the court please, we object to that question for the reason the proponent of the will in opening this case voluntar- went into the sanity and mental capacity of the Testator, Waco Bruner, and introduced a number of witnesses to prove his sanity and mental capacity and we urge that this is not part of this case in rebuttal; it is part of the case in chief, and it is clear that they shall not introduce part of the witnesses and rest and come in with another line of witnesses on the same thing. They went in to this and we answered it, and there is no rebuttal of this character at all.

By the Court: I think all the witnesses they introduced all testi-

fied. Where the will was executed and at the time, and beyond that they did not go,—at the time of the execution of the will.

Objection overruled.

By Mr. Skinner: We except.

By the Witness:

A. His mind was the same in my opinion that it always had been when I knew him formerly.

By Mr. Moffitt:

Q. Just state in your opinion was he of sound mind or unsound mind?

A. I would consider it sound, in my opinion.

By Mr. Moffitt: That is all.

Cross-examination.

By Mr. Skinner:

Q. He would come in and buy some little something?

A. Yes sir.

Q. What business transactions have you ever had with him?

A. He come in the store and purchased shoes, clothing, etc.

103 Q. Pay for it?

A. Yes sir.

Q. Did you ever have any extended conversation with him?

A. No sir.

Q. Did he ever come to your house?

A. No sir.

Q. Never lived at your house?

A. No sir.

Q. You never lived any place he did?

A. No sir.

Q. Do you know where he lived?

A. He lived with an old lady, Tihoca.

Q. He was that whispering Waco Bruner?

A. Yes, he whispered.

Q. He would come in and buy some little something and pay for it and that was about the extent of that conversation?

A. Yes sir.

By Mr. Skinner: That is all.

Witness excused.

104 Hood Hardage, a witness produced, sworn and examined on behalf of proponents in rebuttal testified as follows, to-wit:

Direct examination.

By Mr. Moffitt:

Q. What is your name?

A. Hood Hardage.

Q. Are you a citizen of the Greek tribe of Indians?
A. Yes sir.
Q. Did you know Waco Bruner in his lifetime?
A. Yes sir.
Q. How long had you known him?
A. Why, about twelve years I guess.
Q. How often did you see him?
A. Not very often.
Q. Was you raised close to where he was raised?
A. No sir.
Q. How often did you see him, Hood, during the last few years of his life?
A. Not very often.
Q. Well, about how often?
A. I don't know, not very many times though I am sure.
Q. Did you know his mental condition two years ago, if you know?

By Mr. Crump: Objected to as incompetent, irrelevant and immaterial, the witness is not qualified on that point.

By the Court: I understand that he said he did not see him very often, I think he can show that the association of the witness was such as to make him competent to speak as to that.

By Mr. Moffitt:

Q. Tell the Jury, Hood, the length of time that it would be between the time of seeing Waco Bruner, the different times, long about two years ago say?
A. Well, it would be maybe a month or two, or something like that.
105 Q. Do you remember of seeing him before he died a short while?
A. No sir, I don't remember of seeing Waco Bruner over two years I reckon before he died. I did not know he was dead until a few weeks ago.
Q. And you did not see him for several years prior to his death?
A. I don't think I did, I don't remember it.
Q. Was that the last time you talked to him?
A. I don't remember when I talked to him the last time, I don't remember whether I talked to him the last time I saw him.
Q. When did you talk to him last?
A. I don't know.
Q. Well, the best of your recollection?
A. I exepct nine years ago since I talked to him.

By Mr. Moffitt: That is all.

Cross-examination.

By Mr. Crump:

Q. It will be longer than that before you talk to him again won't it?
A. I expect it will.

By Mr. Crump: That is all.
Witness excused.

106 WELEETKA HARDAGE, a witness produced, sworn and examined on behalf of the proponents in rebuttal testified as follows:

Direct examination.

By Mr. Moffitt:

Q. State your name?
A. Weleetka Hardage.
Q. Age?
A. Fifty years.
Q. Residence?
A. Spaulding, one and a half miles from Spaulding.
Q. Are you a citizen of the Creek Nation, Mr. Harding?
A. Yes sir.
Q. Did you know Waco Bruner in his lifetime?
A. I knew of him, I have seen him about fourteen years ago.
Q. Did you know him personally?
A. Well, I did then, about fourteen years ago.
Q. Have you known him since then?
A. No sir, if I ever saw him since I didn't know him.

By Mr. Moffitt: That is all.
By Mr. Crump: That is all, you may go.
Witness excused.

107 DORSEY SMITH, a witness produced, sworn and examined on behalf of the proponents in rebuttal, testified as follows:

Direct examination.

By Mr. Moffitt:

Q. What is your name?
A. Dorsey Smith.
Q. Age?
A. Thirty-seven.
Q. Residence?
A. Four miles North of Calvin.
Q. Occupation?
A. Farming.
Q. Did you know Waco Bruner in his lifetime?
A. Yes sir.
Q. How long have you know- him prior to his death?
A. About five years prior to his death.
Q. How frequently did you see him and talk with him during the time you knew him?
A. Sometimes two or three times during a month and may be month or two I never saw him, but I seen him every two months, two or three times.

Q. Did he ever stay at your house any?
A. No sir.
Q. Would he come into your house?
A. No sir.
Q. Where would you see him?
A. At Party Beaver's.
Q. During the time you would see him did you converse,—talk with him, hold conversation with him?
A. Yes sir, sometimes I would.
Q. Did you observe his actions and conversation with relation to his mind being sound or unsound?

108 By Mr. Crump: Objected to as incompetent, irrelevant and immaterial. Let him state what he did or said and base his opinion upon that.

By the Court:

Q. How long had you known this man?
A. About three years.
Q. How often did you see him during that time?
A. Sometimes two or three times a month, and maybe a couple of months before I would see him.

By the Court: Objection overruled.
By Mr. Crump: We except.

By the Witness:

A. He had a sound mind—good sense as most any of us.

By Mr. Moffitt:

Q. Did he talk intelligently?
A. Yes sir.
Q. Did you have a conversation with him at Party Beaver's house a short while before he died?
A. Yes sir.
Q. How long was that before he died?
A. That was on Sunday before he died about Wednesday.
Q. That was at Party house down on little river?
A. Yes sir, down on little river.
Q. Can you relate that conversation to the jury?

By Mr. Crump: Objected to as incompetent, irrelevant and immaterial.
By the Court: Unless about the contents of this will sustained.

By the Court:

Q. Was it anything about willing his property?

By the Witness:

A. Yes sir.

109 By the Court: Objection overruled.
By Mr. Crump: We except.

By Mr. Moffitt:

Q. Tell the jury what he told you?

A. He told me—I asked him what was the reason he did not stay with his people and he said it was because his people did not care anything for him and he willed his stuff to Mr. Bilby—Mr. Bilby taken care of him, got him medicine and his people did not want to see him around. I gave him some medicine, he said he wanted to go some place to get some medicine.

Q. Did he in that conversation say anything to you about what the future action of his relatives might be in regard to this will?

A. He told me they would not take care of him and did not want them to reap his stuff after he died.

By Mr. Moffitt: That is all.

Cross-examination.

By Mr. Crump:

Q. Did he?

A. Yes sir.

Q. Did he whisper to you?

A. Yes sir, he did.

Q. How far did he die from Bilby's?

By Mr. Lawson: Objected to as incompetent, irrelevant and immaterial.

By the Court: Objection sustained, not proper cross examination.

By Mr. Crump: Defendant excepts.

By Mr. Crump:

Q. Do you know where he died?

A. At Tom Sewell's I suppose.

110 Q. When did he die?

A. On Wednesday or Thursday after I saw him on Saturday.

Q. How far did you live from Tom Sewell's?

By Mr. Moffitt: Objected to as incompetent, irrelevant and immaterial, not proper cross examination.

By the Court: Objection sustained, not proper cross examination.

By Mr. Crump: We except.

By Mr. Crump:

Q. Who was present when he was whispering to you?

A. No one.

Q. You pulled it off by yourself?

By Mr. Moffitt: Objected to as improper cross examination.

By the Court: Objection sustained.

By Mr. Crump: We except.

By Mr. Crump:

Q. How come you to go over there?

By Mr. Lawson: Objected to as incompetent irrelevant and immaterial.
By the Court: Objection overruled.
By Mr. Lawson: Plaintiff excepts.

By the Witness:

A. I went over there because Party Beaver's wife and my wife were cousins and all were over there visiting.
Q. Did you- wife go with you?
A. Yes sir.
Q. And went to Tom Sewell's?
111 A. No sir, I said Party Beaver's.
Q. What time did you get there?
A. Friday night and went away Sunday.
Q. Was that Indian in bed?
A. Yes sir, laying on a pallet by the stove.
Q. Did he have any medicine?
A. Not at that time, he wanted me to go over to see Mr. Bilby to get medicine for him?
Q. Did Mr. Bilby go?
A. I don't know.
Q. Did you go over and tell Bilby there was a very dear friend of his over there about to die with consumption?

By Mr. Moffitt: Objected to as incompetent, irrelevant and immaterial.
By the Court: Objection sustained.
By Mr. Crump: We except.

Q. Did you convey the message to Bilby?
A. No sir he was not at home.
Q. Did you get him any medicine?
A. No sir, I had some medicine with me and bathed his breast and said he would have to get some.
Q. What was it that you had with you?

By Mr. Moffitt: Objected to as incompetent, irrelevant and immaterial.
By the Court: Objection sustained.
By Mr. Crump: We except.

By Mr. Crump:

Q. You are not a physician are you?
A. No sir.

By Mr. Moffitt: Objected to as improper cross examination.
By the Court: Objection overruled.
By Mr. Moffitt: Plaintiff excepts.

112 By Mr. Crump:

Q. What were you carrying that medicine around for?

By Mr. Moffitt: Objected to as incompetent, irrelevant and immaterial, and not proper cross examination.

By the Court: Objection sustained.

By Mr. Crump:

Q. You went over there to see him or Polly Beavers, which? The sick Indian or Polly Beavers?
A. The sic*h* Indian—I went to see the sick Indian and Polly Beaver's too.
Q. Did you know he was there?
A. Yes sir.
Q. He had as good sense as anybody?
A. Yes sir.
Q. Who vouches for you?
A. Who vouches for you.

By Mr. Moffitt: We object to that.
By the Court: Objection sustained.
By Mr. Crump: That is all.
Witness excused.

113 EMMA SMITH, a witness produced, sworn and examined on behalf of the proponents in rebuttal testified as follows:

Direct examination.

By Mr. Moffitt:

Q. What is your name?
A. Emma Smith.
Q. Where do you live?
A. Calvin.
Q. Are you the wife of Dorsey Smith that left the witness stand?
A. Yes sir.
Q. Are you a citizen of the Creek Nation?
A. Yes sir.
Q. Did you know Waco Bruner in his lifetime?
A. Yes sir.
Q. How long had you known him?
A. Nine years.
Q. How often did you see Waco Bruner during the last few years of his life?
A. About three times a month.
Q. About three times a month on the average?
A. Yes sir.
Q. From your observation of him, in your opinion did you think his mind was sound or unsound?
A. It was sound.

By Mr. Moffitt: That is all.

Cross-examination.

By Mr. Crump:

Q. Did you see him on Sunday before he died on Thursday?
A. Yes sir.

Q. You saw him over at Polly Beaver's house?
A. Yes sir.
Q. You are kin to Polly Beaver?
A. He is my cousin by marriage.
Q. You and Mr. Smith were over there to see his Indian?
114 A. Yes sir.
Q. You heard he was there about to die?
A. Yes sir, he was sick and we went over there.
Q. You took him over some medicine?

By Mr. Lawson: Objected to as not proper cross examination.
By the Court: Objection overruled.
By Mr. Lawson: Plaintiff excepts.

By Mr. Crump:

Q. Did you?
A. No sir, I never.
Q. You gave him medicine didn't you?
A. No sir.

By Mr. Moffitt: Objected to as incompetent, irrelevant and immaterial and not proper cross examination.
By the Court: Sustained as not proper cross examination.
By Mr. Crump: Give us an exception.

By Mr. Crump:

Q. Mr. Smith gave him medicine?
A. He told me he did.
Q. When had you seen him before this?
A. Saturday.
Q. When had you seen him before that?
A. I saw him about two weeks before I seen him again.
Q. Where did you see him at?
A. Over at Bilby.
Q. Over there making another will to Bilby?

By Mr. Lawson: Objected to as incompetent, irrelevant and immaterial and impertinent.
115 By the Court: Objection sustained.
By Mr. Crump: It might be the killing of the second that he had made.
By Mr. Moffitt: We object to that remark and ask that it be stricken.
By the Court: Objection sustained, and the jury will not pay any attention to the remarks of counsel.

By Mr. Crump:

Q. When did you see him before the two weeks you saw him before he was sick?
A. I don't remember. I seen him in Holdenville here.
Q. Where did you see him before that?
A. Well, I seen him lots of times at Party Beaver's.
Q. What was he doing at Bilby?

A. Trading there.
Q. What was he buying?
A. I didn't know, said that he was buying groceries and clothes together.
Q. What kind of clothes, groceries was he buying?

By Mr. Moffitt: Objected to as incompetent ,irrelevant and immaterial, and not proper cross examination.
By the Court: Objection sustained as not proper cross examination.
By Mr. Crump: Give us an exception.

By Mr. Crump:

Q. Do you know how long you have known him?
A. Known him?
Q. Yes?
A. About nine years.
Q. You say that he had a good sound mind?
A. Yes sir.
116 Q. You know that he did not have a weak mind either do you?

By Mr. Moffitt: Objected to as incompetent, irrelevant and immaterial, and not proper cross examination.
By the Court: Sustained as not proper cross examination.
By Mr. Crump: Give us an exception.

By Mr. Crump:

Q. You know that he is just a roaming, full-blood Creek Indian don't you?

By Mr. Lawson: Objected to as incompetent, irrelevant and immaterial and not proper cross examination.
By the Court: Objection sustained.
By Mr. Crump: Give us an exception.

By Mr. Crump:

Q. For the last nine years that you had known him he had just lived from place to place without any home?
A. Yes sir.

By Mr. Moffitt: Objected to as improper cross examination.
By the Court: Sustained. You can ask her where he lived the last nine years if you want to.

By Mr. Crump:

Q. I will ask you if he had just lived from place to place for the last nine years?

By Mr. Moffitt: Objected to as incompetent, irrelevant and immaterial not proper cross examination, and argumentative.
By the Court: Objection overruled.
117 By Mr. Moffitt: Plaintiff excepts.

By the witness:

A. Yes sir, I guess he had.

By Mr. Crump:

Q. He did not have sense enough to prepare him a home did he?

By Mr. Lawson: Objected to as incompetent, irrelevant and immaterial and not proper cross examination.
By the Court: Objection sustained.
By Mr. Crump: Give us an exception.

By Mr. Crump:

Q. What particular thing did he ever do that made you think he had good sense?
By Mr. Moffitt: Objected to as incompetent, irrelevant and immaterial.
By the Court: Objection sustained.
By Mr. Crump: Give us an exception.

By Mr. Crump:

Q. Upon what do you base you- opinion that he was sane or had good sense?
A. Well, he just talked as good as anybody—had a good mind, I know that, that is all I know.
Q. Do you talk as good as anybody and have good mind?
A. Yes sir.
Q. What did he talk about?
A. What do you talk about when you want to talk; that is what he did.
Q. What did he talk about?
A. He talked about business.
118 Q. Isn't it a fact that you,—all he talked about was this making this will to Mr. Bilby?

By Mr. Moffitt: Objected to as incompetent, irrelevant and immaterial, and not proper corss examination.
By the Court: Objection sustained.
By Mr. Crump: Give us an exception.

By Mr. Crump:

Q. Did you hear what he talked about the last time you were with him?
A. Yes sir.
Q. What was it?
A. He said could I go see Bilby—on Saturday I come up to Holdenville to trade some—and he said I wish you would see Bilby, I said I don't know, I was not going that way, and he said I wish you would. I want to see him, I want him to come over here.
Q. Did you tell Mr. Bilby?
A. No sir, I never seen him.
Q. What did you talk about before that?
A. I don't know.
Q. Is that the only conversation you ever had with him?
A. Yes sir.

Q. While ago when you said he was at Polly Beaver's, is that the only conversation you ever had with him?
A. Yes sir.
Q. You are not very well acquainted with him are you?
A. Yes sir, pretty well acquainted with him.
Q. You have talked to me more this evening than you did him hav-n't you?
A. I think I talked to him more than I have you.
Q. Not much more did you?
A. I did not pay much attention. I did not count it.
Q. You live down there by Bilby do you?
119 A. Yes sir.
Q. Mr. Bilby got you to come up here?

By Mr. Moffitt: Objected to as incompetent, irrelevant and immaterial and not proper cross examination. Objection withdrawn.

By the witness:

A. Yes sir, he subpœnaed me.

By Mr. Crump:

Q. He got you to go and he talked with you about it and you trade with him?
A. I do not trade with him, no sir.
Q. Well, do you trade with him?
A. I used to but don't trade with him now.

By Mr. Crump: That is all.
Witness excused.

120 ANNIE STEWART, a witness produced, sworn and examined on behalf of the proponents testified in rebuttal as follows:

Direct examination.

By Mr. Moffitt:

Q. What is your name?
A. Annie Stewart.
Q. Have you been sworn as a witness in this case?
A. Yes sir.
Q. How old are you?
A. About seventy, I don't know exactly.
Q. Are you a citizen of the Creek Nation?
A. Yes sir.
Q. Did you know Waco Bruner in his lifetime?
A. No sir, I never did know him in his lifetime, I just knew him lately.
Q. How long have you known him?
A. I guess it is over ten years.
Q. That was while he was living was it?
A. Yes sir.
Q. During his lifetime?
A. Yes sir.

Q. How often would you talk to him during the time you were acquainted with him?

A. I never did see him much—him in a long time, and sometimes come up to town to get to see him and talk with him sometimes.

Q. During the last two years of his life did you talk to him frequently?

A. Yes sir.

Q. In your opinion, Annie, was Waco Bruner of sound or unsound mind?

A. He could not talk good.

Q. I know, but was his mind sound or unsound?

A. It seemed all right to me when he talked to me.

By Mr. Moffitt: That is all.

121 Cross examination.

By Mr. Crump:

Q. You say you knew him for about ten years?

A. Yes sir.

Q. I will ask you to state what time you knew him if he did not roam around from place to place?

A. Yes sir.

By Mr. Moffitt: Objected to as incompetent, irrelevant and immaterial.

By the Court: Objection overruled.

By Mr. Crump:

Q. He had no home?

A. No sir.

Q. But just considered a weak minded sick Indian?

A. Yes sir.

By Mr. Crump: That is all.

Witness excused.

122 G. W. McShan, a witness produced, sworn and examined on behalf of the proponents testified as follows in rebuttal:

Direct examination.

By Mr. Moffitt:

Q. What is your name?

A. G. W. McShan.

Q. Have you been sworn as a witness in this case?

A. Yes sir.

Q. Your age?

A. Fifty-three.

Q. Place of residence?

A. Holdenville.

Q. Occupation?

A. Merchandise.
Q. How long have you lived in Holdenville?
A. This is my eighteenth year.
Q. Did you know Waco Bruner in his lifetime?
A. Yes sir.
Q. How long had you known him?
A. Well, possibly seventeen years, up until he died.
Q. How frequently would you see him during the time of your acquaintance with him, Mr. McShan?
A. Well, something like once a month or twice up to the last year or two. I don't think he had been coming to town quite that often the last year or two.
Q. Did he transact business with you?
A. Bought goods, yes sir.
Q. Those times, would you have a conversation with him?
A. Nothing more than just a business conversation selling goods.
Q. And in your opinion was he of sound or unsound mind?
A. I always taken him to be sound.
Q. You did business with him as a man of sound mind?
A. Sound mind, yes sir.
Q. Did you not furnish the coffin for him at the time of his death?
A. I did.
123 Q. Who ordered the coffin?
A. Mr. Bilby.
Q. Did he pay for it?
A. Yes sir.

By Mr. Moffitt: That is all.

Cross-examination.

By Mr. Crump:

Q. Did Mr. Bilby shed any tears at the time he bought it?
A. He sent a check through the mail.

By Mr. Moffit: We object to the question as incompetent, irrelevant and immaterial and impertinent.

By the Court: I think the objection is good he said he sent a check through the mail and of course he did not know. Objection sustained.

By Mr. Crump:

Q. Mr. McShan you never sold him anything except some little simple thing, he was not keeping house, roaming around?
A. I sold him goods from time to time, I could not tell all of the goods.
Q. Was it candy or anything like that?
A. I do not handle candy.
Q. It might have been a knife?

By Mr. Moffitt: Objected to.

A. I suppose the most he bought was kind of small.

By Mr. Crump:

Q. You don't remember of selling him anything for the last two years do you?

A. Yes sir, not long before he died he was in our store and bought some little something, I don't know what it was.

Q. He whispered didn't he?

124 A. Yes sir.

Q. And just come in and said give me a knife or whatever it was and got out?

A. Yes sir.

Q. And he never talked much?

A. Sometimes he talked a little bit.

Q. You say you consider him of sound mind or weak mind?

A. I consider him of sound mind.

Q. In other words, you would not call him an idiot?

A. No sir.

Q. And you would not call him a smart man would you?

A. No sir, while he whispered, it never did occur to my mind that he was of unsound mind.

Q. He was just a weak minded, sick, simple Indian?

By Mr. Moffitt: Objected to as incompetent, irrelevant and immaterial and improper cross-examination.

By the Court: Objection sustained.

By Mr. Crump: Give us an exception.

That is all.

Witness excused.

125 Ed Turner, a witness produced, sworn and examined on behalf of the proponents testified in rebuttal as follows:

Direct examination.

By Mr. Moffitt:

Q. What is your name?

A. Ed Turner.

Q. You have been sworn as a witness in this case?

A. Yes sir.

Q. What is your age?

A. Twenty-seven.

Q. Where do you live?

A. Holdenville.

Q. How long have you been living here?

A. Between nine and ten years.

Q. Did you know Waco Bruner in his lifetime?

A. Yes sir.

Q. How long have you known him?

A. Five or six years.

Q. During that time how often did you see him and talk with him?

A. I saw him very often, I worked for Mr. Bilby.
Q. Did you work for Mr. Bilby for awhile?
A. Yes sir.
Q. And Waco Bruner stayed around there?
A. Yes sir.
Q. About how often was he up there?
A. Nearly every day.
Q. And you talked with him during these times?
A. Yes sir, he come up there and sit around there, worked there I suppose at that time.
Q. In your opinion was Waco Bruner of sound or unsound mind?
A. He seemed to be of sound mind.

By Mr. Moffitt: That is all.

Cross-examination.

By Mr. Crump:

Q. One of the best traders in that country was he?
126 A. I don't know.
Q. You knew what he did did you?
A. While I was there he was around the store a good while.
Q. *I* worked for Mr. Bilby?
A. I was.
Q. Bilby had his land under lease?

By Mr. Moffitt: Objected to as not proper cross-examination.
By the Court: Objection sustained.

By Mr. Crump:

Q. He come there and did some trading would he?
A. Yes sir.
Q. Buy some candy and stay around there and eat it, that is about all he bou-t wasn't it?
A. Well, he bought some groceries there.
Q. Did he eat them there?
A. I don't know.
Q. Where did he live?
A. I don't know.
Q. He was a single man wasn't he?
A. I don't know whether he was or not.
Q. Did you have any conversation with him?
A. No sir, not particularly.
Q. Well, I don't mean a private conversation like some others, did you have any conversation at all?
A. Yes sir.
Q. What about?
A. About being over there fishing.
Q. Was that all?
A. Yes sir.
Q. You say he come over there and bought some candy and a

few groceries and stayed around there and eat it and had a conversation about fishing, is that all?

A. Yes sir.

127 Q. And from that you say he had a sound mind?

A. Yes sir.

Q. How long ago has that been?

A. In 1908.

By Mr. Crump: We now ask that this testimony be stricken.

By the Court: Motion overruled.

By Mr. Crump: Give us an exception.

By Mr. Moffitt: That is not it, because the last time he saw him was in 1908.

By Mr. Crump:

Q. Is that the last time you saw him?

A. No sir, that was when I was at work for Bilby there at the store.

Q. When was the last time you saw him?

A. I saw him several times here at Holdenville?

Q. What was he doing?

A. Standing around here in town.

Q. Just gawking around?

A. I don't know whether you would call it gawking around or not.

Q. No business; what was he eating; candy?

A. I don't know whether he was eating candy or not.

By Mr. Crump: That is all.

Witness excused.

128 *Will Admitted in Evidence.*

By Mr. Moffitt: I now offer the will in evidence.

By Mr. Crump: Objected to in that the testimony shows that it was executed by a full-blood Indian and therefore void.

By the Court: Objection overruled.

By Mr. Crump: We except.

(Here will is offered and admitted in evidence, which will is in words and figures as follows, to-wit:)

129 I, Waco Bruner, of Hughes County, State of Oklahoma, being of the age of fifty-eight years, and being now in full strength of mind but of poor health, and being sensible of the uncertainty of life, and desiring to make disposition of my property and affairs while in condit-on so to do, do hereby make, publish and declare the following to be my last will and testament, hereby revoking and cancelling all other or former wills by me at any time made.

1st.

I hereby direct the payment of all my just debts and funeral expenses.

2nd.

To my uncle, Albert Stewart, I hereby give the sum of Ten ($10.00) Dollars.

3rd.

To my Aunt, Lucy Stewart, I hereby give the sum of Ten ($10.00) Dollars.

4th.

To my nephew, Ben Reed, I hereby give the sum of Five ($5.00) Dollars.

5th.

To my friend and keeper, N. V. Bilby, I hereby give, devise and bequeath all the balance and residue of my estate, both real and personal including the real property allotted to me as a citizen of the Creek or Muskogee Nation and described as follows. The West Half (½) of the North-West Quarter (¼) of Section Eight (8) and the East Half (½) of the North-East Quarter (¼) of Section Nine (9) East, in Hughes County, State of Oklahoma.

Having no wife and no children and no relatives nearer than those herein remembered and feeling under no obligations to them, and realizing the acts of kindness heretofore shown me by my friend Mr. N. V. Bilby, he having furnished me with livelyhood, food and clothing, for the last twelve years, and leaving no one other than Mr. Bilby to look to for my care and comfort and the necessaries of life for the future of my life, and fully realizing that he will provide for me fully, I have made him the bequest herein.

I hereby appoint and designate H. B. Moffitt sole executor of this, my last will and testament.

In witness whereof I, Waco Bruner, have to this may last will and testament consisting of one double sheet of paper, subscribed my name this 18th day of March A. D. 1911.

his
WACO x BRUNER.
mark.

The name of Waco Bruner was written by me and I witness his mark. I wrote his name at his request & presence.

JAMES A. LONG.

Subscribed by, Waco Bruner, in the presence of each of us, the undersigned, and at the same time declared by him to us to be his last will and testament, and we, thereupon at the request of Waco Bruner, in his presence and in the presence of each other, sign our names hereto as witnesses this 18th day of March A. D. 1911.

JAMES A. LONG,
Wetumka, Ok.
J. R. DUTTON,
Holdenville, Okla.

STATE OF OKLAHOMA,
County of Hughes, ss:

Before me, L. S. Fawcett, United States Commissioner in and for the Eastern District of Oklahoma, on this 18th day of March, 1911 personally appeared Waco Bruner, to me personally known to be the identical person who executed the within and foregoing instrument declaring the same to be his last will and testament, and acknowledged to me that he executed the same as his free and voluntary act and deed for the uses and purposes therein set forth, and said will is by me approved.

L. S. FAWCETT,
United States Commissioner, East. Dist. Okla.

Filed for Probate this 23" day of Nov. 1912. J. E. Simpson, Clerk County Court.
"Ex. One for Pltf." Hall, Dist. Court.

131 PAUL ROSS, a witness produced, sworn and examined on behalf of the contestants in rebuttal testified as follows:

Direct examination.

By Mr. Crump:

Q. What is your name?
A. Paul Ross.
Q. Have you been sworn as a witness in this case?
A. Yes sir.
Q. Where do you live?
A. Here in Holdenville.
Q. How long have you lived here?
A. About four months.
Q. You know N. V. Bilby?
A. Yes sir.
Q. And you have lived by him?
A. Yes sir.
Q. Did you ever witness a will from Waco Bruner to N. V. Bilby?

A. By Mr. Moffitt: Objected to as incompetent, irrelevant and immaterial, and not proper sur-rebuttal.
By the Court: For this purpose I think it would be proper. Objection overruled.
By Mr. Moffitt: Plaintiffs except.

By the Witness:

A. Yes sir.

By Mr. Crump:

Q. Where was it?
A. At Bilby's office.
Q. When was it?
A. I can't recall the date.

Q. About how many years ago?
A. In October 1910 if I remember.
Q. Who was present?
132 A. Isom White and myself were there.
Q. Who else was present?
A. I don't remember.
Q. Was the Indian there?
A. Yes sir.
Q. Was Bilby there?
A. Yes sir.
Q. What did Bilby say to you?

By Mr. Moffitt: Objected to as incompetent, irrelevant and immaterial, and not proper rebuttal.

By the Court: The only purpose would be for contradicting Bilby.

By Mr. Crump:

Q. Who signed the will, Mr. Ross?
A. Waco Bruner.
Q. Who was the will made to?
A. N. V. Bilby.
Q. Was Bilby present?
A. Yes sir.
Q. Did he ask the Indian to ask you to sign the will?

By Mr. Moffitt: Objected to as incompetent, irrelevant and immaterial.

By the Court: Objection overruled.

By Mr. Moffitt: We except.

By Mr. Crump:

Q. Did Mr. Bilby tell the Indian to ask you to sign your name as a witness?
A. He said it would not be legal unless he did.
Q. And he told you to sign your name to the will?
A. Yes sir.
Q. And then he asked you and then you signed it?
133 A. Yes sir.
Q. The Indian done just what Bilby told him to do?
A. Yes sir.

By Mr. Crump: That is all.
We rest your Honor.
By Mr. Moffitt: That is all.
This is all the testimony in this case.
Witness excused.

By Mr. Moffitt: I want to move for a peremptory instruction and I want to be heard if the court will listen to me.

By the Court: We will adjourn until 7:30 o'clock to-night for the further hearing of this cause. Gentlemen of the jury you are ex-

cused until 7:30, don't discuss this case with any one or permit any one to discuss it with you and return back here to-night at 7:30.

(Court adjourns until 7:30 o'clock P. M.)

134 Now, at 7:30 o'clock P. M. of said day, Court convenes pursuant to adjournment and both parties are present by their respective counsel and the jury return into the Court room and both sides agree that all of said jurors are present and in their respective places in the jury box and the trial of said cause is resumed by the Court instructing the jury in writing as to the law of the case, after which counsel for both sides argue the case to the jury, whereupon the jury retire into the jury room for the purpose of considering their verdict.

Admission of Counsel for Contestants Before Argument.

By the Court: At the close of the evidence in the foregoing case and just before argument Mr. Skinner, as counsel for the contestants stated in open Court that the Contestants admitted that the proponents had made out a prima facie case, and that the burden of proof was upon he contestants to show that there was undue influence used by the Beneficiary to procure Waco Bruner's will, and that the burden was upon the contestants to show that the Testator had not sufficient mental capacity to make a will, and this burden was voluntarily conceded by the contestants. And Mr. Skinner further stated that if the contestants did not show this by a fair preponderance of the evidence, the contestants conceded that they were not entitled to prevail on the two questions submitted to the jury.

The Instructions as given by the Court to the jury are as follows, to-wit:

135 STATE OF OKLAHOMA,
Hughes County, ss:

No. 1235.

In re Estate of WACO BRUNER, Deceased.

Motion for New Trial Overruled. Appeal Granted to the Supreme Court of Oklahoma.

Now, on this the 30th day of April, 1913, same being one of the regular judicial days of the March, 1913 Term of the District Court of Hughes County, Oklahoma, this cause came on regularly to be heard upon the motion filed herein by the proponent, N. V. Bilby, for a new trial in said cause, and said proponent, N. V. Bilby, being represented by his attorney, Lewis C. Lawson, and the Contestants herein being represented by their attorneys, Crump & Skinner, and the court being sufficiently advised in the premises finds: That the

motion for a new trial should be overruled to which the proponents excepts and prays an appeal to the Supreme Court.

Wherefore it is ordered, adjudged and decreed that the motion for a new trial herein be and the same is hereby overruled, to which the proponent excepts and prays an appeal to the Supreme Court of Oklahoma, which is granted, proponent, N. V. Bilby is given sixty days in which to prepare and serve case-made herein, Contestants *is* given ten days in which to suggest amendments thereto, and same to be settled within ten days upon five days notice. Supersedeas bond herein is fixed at the sum of Two Hundred and Fifty ($250.00) Dollars.

JOHN CARUTHERS, *District Judge.*

136 In the Supreme Court of the State of Oklahoma.

5702

NICHOLAS V. BILBY and H. B. MOFFITT, Plaintiffs in Error,
vs.
ALBERT STEWART, LUCY STEWART, WILLIE CORNELL, SAMPSON BUCK and NATHAN STEWART, Defendants in Error.

Petition in Error.

Come now the plaintiffs in error, Nicholas V. Bilby and H. B. Moffitt, and here states to the court that on the 18th of March, 1911, Waco Bruner executed his last will and testament whereby he made disposition of all his property, both real and personal, and by which said Nicholas V. Bilby was made the principal beneficiary of the will and said Moffitt was therein designated as the executor thereof; that on or about the 20th of November, 1913, said Bruner died whereupon said Moffitt presented his petition to the County Court of Hughes County, Oklahoma, wherein said Bruner lived at the time of his death, for the probation of said will (pages 2 and 3); that the probation of said will came on to be regularly heard by said court, and the same was contested by said defendants in error (page 16); and the contest in writing was replied to by said plaintiffs in error (page 20), both as to the law and facts presented in said contest; that, on the 16th of January, 1913, said matters came on to be heard before said County Court, and after hearing the evidence in the case, said court found that at the time of the execution of said will, said Waco Brunner was of sound mind and memory and that said will was duly executed and published by said Brunner; but also held and found that, in as much as said Brunner was a full blood Creek Indian and could not alienate his allotment thus attempted to be disposed of in said will, that said instrument was therefore null and void as the last will and testament of the said Waco Brunner (pages 25 and 26), and refused to probate the same, whereupon said plaintiffs in error moved said court to set aside said judgment and
137 grant them a new trial therein for reasons assigned in said motion, (page 27); but the said court overruled said motion

to which said plaintiffs in error excepted, (page 29); whereupon said plaintiffs in error gave the notice of appeal and the bond required by law to take an appeal from said judgment to the District Court of said County, (pages 32 to 26 inclusively,) and the case was regularly taken on appeal to said District Court.

Second: That on the 15th day of March, 1913, said matters came on to be heard on appeal in said district court, whereupon said matters were submitted to trial by jury; but on the trial thereof the said district court submitted to said jury only two questions of fact, to-wit: 1st, "Did N. V. Bilby use undue influence in order to procure Waco Brunner to make the alleged will?"; 2nd, "Did Waco Brunner at the time of the execution of the alleged will have a sound and disposing mind and mental capacity to execute it"; and to said first question, the said jury returned a verdict of "Yes;" and to the second question, such verdict was "No," (page 166); whereupon, said plaintiffs in error on the 17th of March, 1913, moved said court to set aside said verdict and grant them a new trial or give judgment on their behalf notwithstanding said verdict; but said court overruled said motion as to said second question and left the verdict as to it stand, but sustained said motion as to said first question and set aside said verdict as to the undue influence of said Bilby, and on the 22nd day of March, 1913, gave judgment therein refusing to probate said will on the ground that said Brunner, at the time of making said will was not of sound mind and mental capacity to make the same, to which action of the court in overruling said motion as aforesaid and refusing to probate said will said plaintiffs excepted, (pages 171 and 172); and on the 24th day of March, 1913, said plaintiffs filed their motion in writing before said court asking that both said verdict and judgment of said district court be set aside and they be granted a new trial therein (page 173), but said motion was, on the 30th day of April, 1913, overruled by said Court, to which action said plaintiff again excepted and gave notice of appeal herein to this court, (page 176).

138 Third. That on the trial of said appeal and after all the testimony was in and the case was ready for argument before the jury, the counsel for contestants admitted that the proponents had made a prima facie case and that the burden of proof was upon the contestants to show that there was undue influence used by the beneficiary to procure Waco Brunner's will etc. and such admission was made a matter of record, as follows:

"At the close of the evidence in the foregoing case and just before argument began Mr. Skinner, as counsel for contestants stated in open court that the contestants admitted that the proponents had made out a prima facie case, and that the burden of proof was upon the contestants to show that there was undue influence used by the beneficiary to procure Waco Brunner's will, and that the burden was upon the contestants to show that the testator had not sufficient mental capacity to make a will, and this burden was voluntarily conceded by the contestants. And Mr. Skinner further stated that if the contestants did not show this by a fair preponderance of the evidence, the contestants conceded that they were not entitled to pre-

vail on the two questions submitted to the jury," as is shown on page 157 of the Case-Made, which case-made is made part hereof.

Plaintiffs in error submit that said judgment of said district court should be reversed, set aside and held for naught, and this cause remanded to said court with specific directions to admit the said instrument purporting to be the Last Will and Testament of said Waco Brunner to probate for the following reasons and for the following grounds:

First. Because said district court erred in submitting said cause to the jury on the two facts specifically set out and submitted to them for decision and whereby their verdict thereon became a special verdict or finding of such facts, contrary to the law governing this case and the verdicts of juries as provided in and by the Constitution of the State of Oklahoma.

139 Second. Because the court erred in overruling the motion of the plaintiffs in error to set aside the ve-dict of said jury and grant them a new trial, or render judgment herein in their favor notwithstanding said verdict, on the grounds and for the reasons set forth in said motion which is hereby referred to and asked to be read and considered as part of this assignment, as fully and completely as if all the grounds therein contained were again set forth herein in hæc verba; and which said motion is to be found on pages 167, 168 and 169, and will be copied verbatim in the brief herein of plaintiffs in error.

Third. Because said court erred in overruling the motion of said plaintiffs in error to set aside said verdict of the jury and judgment of said court rendered herein refusing to probate said Last Will and Testament of said Waco Brunner, which said Motion is to be found on pages 173 and 174 of the Case-Made, and the same and each ground thereof is hereby referred to and asked to be read and considered herewith as fully and completely as if again set forth in hæc verba in this assignment of error.

Fourth. Because the court erred in holding, finding and adjudging that, at the time of executing said will, the said Waco Brunner did not have a sound and disposing mind, and in sustaining that part or portion of said verdict of said jury wher-in it found that at the time said will was so executed said Waco Brunner did not have a sound and disposing mind and mental capacity to execute it; because such verdict and judgment is contrary to the law and the evidence in this case; and is likewise not sustained "by a fair preponderance of the evidence," as was admitted by contestants must exist before they were entitled to a verdict or judgment in the case, as shown by said admission on page 157 of the record.

Fifth. Because said judgment and verdict is contrary to the evidence in this case, and the law governing its final determination and probation.

140 Sixth. Because of the numerous errors of law committed on the trial of the case and objected and excepted to by the plaintiffs in error as shown on the face of the record herein.

For the reasons and upon the grounds herein above designated, the plaintiffs in error submit there is error in the trial of said cause, and

ask that said judgment herein of said district court be reversed and remanded with instructions to said court to direct the probation of said will in the way and manner required and provided by law.

August 4th, 1913.

Respectfully Submitted.

LEWIS C. LAWSON,
Counsel for Said Plaintiffs in Error.

Filed Oct. 31, 1913. W. H. L. Campbell, Clerk.

141 STATE OF OKLAHOMA,
County of Hughes, ss:

In the District Court.

Filed Jan. 28, 1914. W. H. L. Campbell, Clerk.

No. 1235.

In the Matter of the Last Will and Testament of WACO BRUNER, Deceased.

Order Correcting Case-Made.

Now, on this the 26th day of January, 1914, there came on to be heard the motion of the Contestants, Albert P. Stewart, et al, praying that this Court make an order correcting the case-made now on file in the Supreme Court of the State of Oklahoma with reference to the testimony of John A. Jacobs, a witness for the Contestants, as is shown on page 70 of said case-made, and it having been made to appear to the Court that said case-made, on page 70, on the second line from the top reads as follows:

"A. He was of sound mind."

and it having been shown to the Court by satisfactory evidence that said answer is erroneous and that the witness, instead of using the above language, used the following language:

"A. He was of unsound mind."

It is therefore ordered by the Court, after being fully advised in the premises, that said case-made now on file in the Supreme Court of the State of Oklahoma in the above entitled matter is hereby corrected, and that on page 70 of said case-made, on the second line from the top, instead of reading "he was of sound mind," shall read "he was of unsound mind."

JOHN CARUTHERS, *Judge.*

142 In the Supreme Court of the State of Oklahoma, Supreme Court Commission, Division Number Three.

Filed Dec. 21, 1915. William M. Franklin, Clerk.

No. 5702.

NICHOLAS V. BILBY, and H. B. MOFFITT, Plaintiffs in Error,
vs.
ALBERT STEWART et al, Defendants in Error.

Syllabus.

1. On appeal to the District Court, from a judgment of the county court refusing to admit a will to probate, the district court may, in its discretion, submit the questions of undue influence and testamentary to a jury, under Section 6515 Revised Laws 1910. The findings of the jury, however, are not binding, but advisory only.

2. Testamentary capacity, or the lack thereof, is a question of fact. There is no rule by which it may be determined, with precision, where capacity ends and incapacity begins, but this question should be determined from all the facts and circumstances of each particular case; and where the evidence fairly and reasonably supports the finding of testamentary incapacity, the same will not be disturbed on appeal.

3. Ordinarily the test of testamentary capacity is the testator's capacity to understand the effect and consequences of his act, at the time the will is executed.

4. Evidence upon the question of testamentary capacity examined and Held to fully support the finding of incapacity.

(Syllabus by Dudley, c.)

Error from the District Court of Hughes County, John Caruthers, Judge.

Action by Nicholas V. Bilby, and others, against Albert Stewart, and others, Judgment for defendants, and plaintiffs bring error. Affirmed.

LEWIS C. LAWSON,
Attorney for Plaintiffs in Error.
CRUMP & SKINNER,
Attorneys for Defendants in Error.

143 Opinion by DUDLEY, *C.:*

On March 18, 1911, Waco Bruner, a full blood Creek Indian, executed a purported will, bequeathing his allotted lands to plaintiff in error, Nicholas V. Bilby, and designating the plaintiff in error, H. B. Moffitt, the sole executor thereof. On November 21, 1912, said alleged testator died in Hughes County, Okla-

homa, seized and possessed of said lands. He was a resident of said County at the time of his death. Bilby is the principal beneficiary under said purported will. He, however, was not related to the deceased.

On November 23, 1912, Moffitt, the executor named in said purported will, presented the same to the County Judge of said County, and filed a petition asking for the probate thereof. The defendants in error, claiming to be the sole and only heirs at law and next of kin of said deceased, filed a contest, protesting against the probate of said purported will, on the grounds, among others, that the same was procured through the undue influence of Bilby, the principal beneficiary therein, and that the alleged testator did not possess the capacity to make the same. Issues were joined and hearing had, resulting in a finding against the contestants upon the questions of undue influence and testamentary capacity, but denying the probate of said purported will for the reason that the testator was a full blood Creek Indian, and on account thereof was incapable of alienating his allotted lands by will. Both the proponents and contestants appealed from this judgment to the District Court of said County, where the case was tried de novo, resulting in a judgment denying the probate of said will on the ground of testamentary incapacity. From this judgment the proponents have appealed.

In the trial of the case in the District Court, the trial court, without objection, submitted to a jury the questions of undue influence and testamentary capacity. The jury found that said purported will was procured through the undue influence of Bilby, and that the alleged testator did not possess testamentary capacity to make the same. The trial court set aside the jury's finding of fact on the question of undue influence, but approved and adopted its finding on the question of testamentary capacity.

144 The proponents first insist that the trial court committed prejudicial error in submitting the two questions of fact to the jury. We think not. The right of trial by a jury guaranteed under Section 19, Art. 2 of the Constitution (Sec. 19, page 15, Williams' Ann. Const.), except as modified by the Constitution itself, means the right as it existed in the Territory of Oklahoma at the time of the adoption of the Constitution. State ex rel. West, Att'y Gen., v. Cobb, County Judge, 24 Okla. 662, 104 Pac. 361; Baker vs. Newton, 27 Okla. 436, 113 Pac. 1034; In re Byrd, 31 Okla. 549, 122 Pac. 516; Ex Parte Dangley, 33 Okla. 180, 128 Pac. 699; Carton v. Deep Fork Drainage District No. 1, 35 Okla. 447, 130 Pac. 263; State Bar Commission, ex rel. Williams, v. Sullivan, 35 Okla. 745, 131 Pac. 703.

Under the law in force in the Territory of Oklahoma at the time of the adoption of the Constitution, neither party in a proceeding of this kind, was entitled, as a matter of right, to a trial by a jury, but the court might, in its discretion, submit certain questions of fact to a jury, the findings of which, however, were not binding, but advisory only. Section 331, Vol. 1, Wilson's Ann. Statutes 1903; Cartwright v. Holcomb, et al., 21 Okla. 548, 97 Pac. 385; Engle v. Yorks, 7 S. Dak. 254, 64 N. W. 132; In re McClellan's

Estate, 20 S. Dak. 498, 107 N. W. 681; Rich. v. Powker, 25 Kans. 7; Hudson v. Hugan, et al., 56 Kans. 152, 42 Pac. 701; Gallon v. Haas, 67 Kans. 225, 72 Pac. 770; Rathjens v. Merrill, 38 Wash. 442, 80 Pac. 754; In re Benton's Estate, 131 Cali. 472, 63 Pac. 775; Estate of Dolber, 153 Cali. 652, 15 A. & E. Ann. Cases, 207, note 211. The section above referred to is as follows:

"When the appeal is on questions of fact or on questions of both law and fact, the trial in the district court must be de novo, and shall be conducted in the same manner as if the case and proceedings had lawfully originated in that court; and such appellate court has the same power to decide the questions of fact which the probate court or judge had, and it may, in its discretion, as in suits in chancery, and with like effect, make an order for trial by jury of any or all the material questions of fact arising upon the issues between the parties, and such an order must state distinctly and plainly the questions of fact to be tried."

This section was carried forward in the Revised Laws 1910 (being Section 6515 thereof), and is in force in this State unless repugnant to the foregoing, or some other, provision of the Constitution, and in our judgment it is not repugnant to such provision, or any other provision of the Constitution, with reference to trial by a jury, as a matter of right. This section of our statute is identical with Section 359 of the probate code of South Dakota, and the Supreme Court of that State, in the case of Shaw, et al., v. Shaw, 133 N. W. 292, considering the same in connection with certain provisions of the Consti-tion of that state, similar to ours, held that it was not repugnant to the provisions of the constitution of that state with reference to the right of trial by jury, and that in proceedings of this kind, neither party is entitled, as a matter of right, to a trial by a jury, but that the court might, in its discretion, submit certain questions of fact to a jury, the findings being advisory only, and not binding. See also Estate of Dolber, supra; In re Gorson's Estate (S. Dak.) 135 N. W. 666; In re Hackett's Estate (S. Dak.) 145 N. W. 437.

Under the foregoing section of our statute, we think the trial court had a right, in its discretion, to submit the two questions of fact to the jury, and that in setting aside the one and approving and adopting the other, it, in effect, determined, from all the evidence, that the alleged testator did not possess testamentary capacity.

Proponents, however, insist that the foregoing section of our statute is in conflict with Section 21, Art. 3 of the Constitution, which provides:

"In all jury trials, the jury shall return a general verdict, and no law in force, nor any law hereafter enacted, shall require the court to direct the jury to make findings on particular questions of fact; but the court may, in its discretion, direct such special findings."

We do not think so. This Section clearly refers to cases in which the parties are entitled to a trial by a jury as a matter of right, and does not in any manner limit or prohibit trial courts, in proceedings of this kind, from submitting certain questions of fact to a jury.

King v. Timmons, 23 Okla. 407, 100 Pac. 526 (see body of opinion.)

Aside from the question as to whether or not the trial court had a right to submit these two questions of fact to a jury, the proponents are not in position to complain here, for the reason that the record shows that no objections were made to the action of the trial court in this respect, but that, as a matter of fact, it was done
146 by the consent of the parties.

It is next insisted that counsel for contestants made certain admissions, after the close of the testimony, that entitled the proponents to have the alleged will probated. The admissions were made while the court was considering the question as to who had the right to open and close the argument, and the substance of the admissions are: That the contestants conceded that the proponents had made out a prima facie case, and that unless the contestants had overcome this, by a preponderance of the evidence, that the will should be admitted a probate. We see nothing in this admission that deprives the contestants of the right to have the question of testamentary capacity determined, upon consideration of all the evidence. There is no merit in this contention.

It is also insisted that the evidence is insufficient to support the finding of testamentary incapacity. The jury found, as above stated, that the alleged testator did not possess testamentary capacity. This finding was approved and adopted by the trial court, which had the effect of a finding of incapacity by the court, and we are called upon to say whether or not the evidence fairly and reasonably supports the finding. We think it does. The evidence upon the question of testamentary capacity is voluminous and sharply conflicting, and it would serve no useful purpose to set it out in detail. It is sufficient, however, to state that the deceased was a full blood Creek Indian; he died seized and possessed of no property other than his allotted lands; he was a bachelor about 45 years old; his father and mother were dead; he left no brothers or sisters surviving him, and the contestants are his nearest relatives. Bilby had been in possession of his lands for several years prior to his death, paying a small rental therefor; the deceased had no home, but stayed with his relatives, friends, and acquaintances, roaming from place to place; he was in bad health and had been, for some time prior to his death, suffering with tuberculosis, and could not speak above a whisper; he spoke broken English, was uneducated, and knew practically nothing about the ordinary business affairs of life. From an examination of all the evidence, we are satisfied that the same fairly and reasonably supports the court's finding of testamentary incapacity.

147 Testamentary capacity, or the lack thereof, is a question of fact. 40 Cyc. 1331; Gordon, et al., v. Gordon, et al. (Kans.), 142 Pac. 242. There is no rule by which it may be determined, with precision, where capacity ends and incapacity begins, but this question should be determined from all the facts and circumstances of each case. Ordinarily the test of testamentary capacity is the testator's capacity to understand the effect and consequences of his

act at the time the will is executed. Wilkinson v. Service, et al., 249 Ill. 146, 94 N. E. 50, 22 A. & E. Ann. Cases, 41; Slaughter v. Heath, et al., 127 Ga. 747, 57 S. E. 69, 27 L. R. A. (N. S.) 1, and note. Testator's incapacity having been determined upon evidence reasonably supporting the same, it will not be disturbed here. Gordon, et al., v. Gordon, et al., supra.

We think the parties had a fair trial, and the judgment of the trial court should be affirmed.

Dec. 21 1915 by the Court: Adopted in whole.

148 In the Supreme Court of the State of Oklahoma.

Filed Jan. 19, 1916. William M. Franklin, Clerk.

No. 5702.

NICHOLAS V. BILBY and H. B. MOFFITT, Plaintiffs in Error,
vs.
ALBERT STEWART et al., Defendants in Error.

Application for Leave to File Petition for Rehearing, etc.

Come now the plaintiffs in error in the above styled cause and present to this Honorable Court that on the 21st day of December, 1915, a decision therein was handed down by the Supreme Court Commission, Division Number Three, affirming the decision of the District Court therein appealed from; that on or about the 5th day of January, 1916, your petitioners filed in said cause in the office of the Clerk of this Court, a petition for a rehearing in said cause; that on or about the 11th day of January, 1916, said Commission denied a hearing herein.

Your petitioners further present that in said motion for a rehearing herein they prayed that said rehearing be granted and thereafter heard by this Honorable Court itself, but your petitioners are informed and believe that said motion was in fact never presented to this Court for consideration, but was denied by said Commission without the knowledge of this Honorable Court.

Your petitioners further state that since said motion for a rehearing was denied, they have examined the Case Made in this cause and discovered that there is no written protest of the defendants in error contained in said Case-Made, against the probation of the will of Waco Bruner, involved in this cause, but there seems to be a written protest of said defendants in error to the probation of another and entirely different will from the one involved in this cause,

149 whereby said defendants in error protest against the probation of a will, purporting to have been made by said Waco Bruner and presented for probate before said County Court by one Thomas Sewell, but which was afterwards abandoned and never probated by said County Court, or otherwise. But, whether the omission of said written protest of the defendants in error against the proba-

tion of the will involved in this cause, from the Case-Made in this cause, was by mere accident or whether the same was never made or presented by the defendants in error before the County Court of Hughes County, Oklahoma, where the will in controversy was offered for probate thereafter, your petitions do not know.

Your petitioners further present that in their humble judgment the orders and decrees in this cause refusing to probate the will involved in this cause and the decision of said Commission, are not sustained either by the law or the evidence in this case, but are contrary to both the law and the evidence as shown by the Case Made filed in this cause; that the will herein in controversy, as well as the right, title and interest of the plaintiff in error, Nicholas v. Bilby, in and to the property involved in said will arise under the several Acts of Congress mentioned and referred to in the answer of the plaintiffs in error filed in said cause and made a part of said case made, and which are hereby referred to; that the said Waco Bruner was a full blood Creek Indian, and therefore, the execution of said will and the legal effect thereof and the necessity or non-necessity of the probation of said will is thereby involved in this cause and presents federal questions arising under said will and the rights therein involved under said respective Acts of Congress; that the probation of said will and a final decision herein present legal propositions arising under said Acts of Congress etc., beyond the probation of an ordinary will, or the will of one who is not a member of said Tribes or a full blood member thereof.

Wherefore, your petitioners humbly pray this Honorable Court do grant them leave to file another motion in this Court for a rehearing herein, setting up the various matters involved in this cause, for a final decision herein; that this cause be transferred from said Commission to this Honorable Court proper for a final hearing and determination of this cause on said rehearing; and that the mandate in this cause be stayed in favor of these plaintiffs in error
150 until the matters involved in such rehearing and this cause herein be finally heard and determined by this Honorable Court, as herein prayed for.

LEWIS C. LAWSON,
Counsel for Plaintiffs in Error.

Endorsements: #5702. In the Supreme Court of Oklahoma, State of Oklahoma. Application for Leave to file petition for rehearing etc. Filed Jan. 19, 1916. William M. Franklin, Clerk.

151 In the Supreme Court of the State of Oklahoma.

No. 5702.

NICHOLAS V. BILBY and H. B. MOFFITT, Plaintiffs in Error,
vs.
ALBERT STEWART et al., Defendants in Error.

Answer to Second Petition for Rehearing Filed by Plaintiffs in Error.

Comes now the defendants in error and for their answer to the petition for rehearing filed herein by Nicholas V. Bilby and H. B. Moffitt, say:

I.

The undersigned Counsel for defendants in error are at a loss to know why the second petition for rehearing has been filed, as they are not advised of any permission having been given by the Court to do so.

II.

Defendants in error deny the facts as alleged in said second petition for rehearing wherein it is alleged that no protest was made against the admission to probate of the alleged will of Nicholas V. Bilby, and in support of said denial defendants in error cite pages 18 and 19 of the case made that was served upon us wherein it clearly appears that a protest was filed against the probate of the will offered by Nicholas V. Bilby. This protest was filed by Ben Reed who as a matter of fact is the sole and only heir of the deceased, Waco Bruner, but by agreement in open court this protest was adopted by all of the defendants in error, who at that time
152 claimed an interest in this litigation, and in support of this contention we refer to pages 20, 21 and 22 of the case made wherein Nicholas V. Bilby and H. B. Moffitt, filed an answer to said protest, which said answer denied each and every charge made by the contestants.

III.

Counsel for defendants in error were not present when the Commission who decided this case passed upon same, and do not know of their own personal knowledge whether said Commission did their duty in passing upon same or not, but allege that the presumption is that said Court in determining this cause did consider the various issues submitted.

IV.

Defendants in error state that this purported second petition for rehearing should be dismissed for the reason that same is frivolous;

that same contains a statement of facts which are not true, according to the case made heretofore referred to, and which if true could not be raised at this time in this court. Counsel for further reason for dismissal of the said purported petition for rehearing say, that same is a reflection upon the Honorable Commission that decided this case on the 21st day of December, 1915, and who did on the 11th day of January, 1916, deny a rehearing therein.

CRUMP & SKINNER,
Attorneys for Defendants in Error.

Endorsements: No. 5702. In the Supreme Court of the State of Oklahoma. Answer to Second Petition for Rehearing Filed by Plaintiffs in Error. Filed Jan. 24, 1916. William M. Franklin, Clerk.

153 Supreme Court, January Term, 1916, January 11th, 1916, First Judicial Day.

And thereafter, at the January, 1916, Term of said Supreme Court, on the 11th day of January, 1916, the following proceeding was had in said cause, to wit:

And now on this day it is ordered by the court that the petitions for rehearing filed in the following list of numbered and styled causes, be, and the same are hereby denied.

* * * * * * *

5702.

N. V. BILBY et al.
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ALBERT STEWART et al.

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154 And thereafter, at the January, 1916, Term of said Supreme Court, on the 29th day of February, 1916, the following proceeding was had in said cause, to wit:

5702.

N. V. BILBY et al.
vs.
ALBERT STEWART et al.

And now on this day it is ordered by the Court that the petition for rehearing filed herein Jan. 5, 1916, be and the same is hereby denied.

155 *Petition for an Allowance of a Writ of Error from the Supreme Court to the Supreme Court of the State of Oklahoma.*

Filed Mar. 15, 1916. William M. Franklin, Clerk.

In the Supreme Court of the State of Oklahoma.

No. 5702.

NICHOLAS V. BILBY and H. B. MOFFITT, Plaintiffs in Error,
vs.
ALBERT STEWART, LUCY STEWART, WILLIE CORNELL, BEN REED, SAMPSON BUCK, and NATHAN STEWART, Defendants in Error.

To the Honorable Matthew J. Kane, Chief Justice of the Supreme Court of the State of Oklahoma:

Your petitioners, Nicholas V. Bilby, and H. B. Moffitt, respectfully show:

That heretofore, to-wit: November 23, 1912, your petitioner, H. B. Moffitt, presented to the County Court of Hughes County, State of Oklahoma, his petition for the probation of a- instrument purporting to be the last will and testament of one Waco Bruner, who died in November, 1912; that said defendants in error appeared before said County Court and contested the probate of said will upon the grounds, among other things, that said Waco Bruner was a full blood Indian, duly enrolled as such, according to the records of the Dawes Commission to the Five Civilized Tribes of Indian Territory; that as such full-blood Indian he had no right to make the purported will thus filed for probate; that said Waco Bruner was prohibited by statute from alienating, conveying or incumbering his real property while he was living, and under the law, he had no right to execute said will, and the same was therefore null and void; that said will was not executed, attested and witnessed as by law required; that said will was procured by fraud practiced upon said Waco Bruner by N. V. Bilby, and others working for him and in his behalf; that at the time of the execution of said alleged will, undue influence was exercised over and upon the said Waco Bruner by said N. V. Bilby, his agents and employees, and that by reason of the improper exercise
156 of said undue influence and duress the execution of said will was procured; that at the time of the execution of said will "that the said Waco Bruner was not of sound mind; that he was incapable of properly appreciating the objects of his bounty; that he was weak minded, easily influenced and incapable of forming an intelligent conception of his property and the objects of his bounty", as shown in the written protest of said Ben Reed and here adopted as the written protest of all said other defendants in error for the purposes of this appeal, the written protests of said other defendants in error not being found in the case-made in this cause before this

court; that to said written protest, the plaintiffs in error filed their answers in writing before said County Court, whereby they denied each and every charge, statement and allegation made and contained in said written contest, except such as were admitted therein, and therein admitted that said Waco Bruner was a full-blood Creek Indian and was so enrolled and that at the time of his death and at the time said will was made on the 18th of March, 1911, said Waco Bruner had no wife, father, mother or children then living etc.; and denied specifically all fraud, duress and undue influence upon said Waco Bruner to induce him to make or execute said will, and denied that he was incompetent to make said will etc, as charged in said contest; and denied further that said will was null and void because of said state statute relied upon in said contest, and set up that said state statute, referred to in said contest, was repugnant to and in violation of an Act of Congress entitled "An Act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes", and especially section 23 of said Act; also another Act of Congress entitled "An Act for the removal of restrictions from part of the lands of allottees of the Five Civilized Tribes, and for other purposes", and especially section 8 thereof; and that the same are also repugnant to and in violation of another Act of Congress entitled "An Act to ratify and confirm an agreement with the Muskogee or Creek Tribe of Indians, and other purposes", and especially section 7 thereof; and another Act of Congress entitled "An Act to ratify and confirm a supplemental
157 agreement with the Creek tribe of Indians, and for other purposes", and especially section 16 thereof; and plaintiffs in error relied upon each and all of said respective Acts of Congress, as to their rights and interests in said matters and the power and authority of said Waco Bruner to make and execute said will; and further set up that said state statutes relied upon by said contestants were repugnant to and in violation of the rights, title and interest of said plaintiffs in error in and to said lands and estate thus devised to said Bilby under said will, and ask that said state statutes be held null, void and ineffectual, as to said will and the rights, title and interest of said Bilby in and to the lands and other property described in said will, under and by reason of said Acts of Congress, whereby full-blood members of said respective tribes were empowered to dispose of their property by their last will and testament, all of which appears from said answer of said plaintiffs in error.

Your petitioners further show that on the 16th of January, 1913, said matters came on to be heard before said County Court and were on said date fully heard by said court, whereupon said court made its finding of fact therein to the effect that said will, bearing date the 18th of March, 1911, purporting to be executed by said Waco Bruner, was in all respects properly executed and attested by witnesses thereto, as by law required; that at the time of its execution, the said Waco Bruner possessed testamentary mental capacity and did not execute said will by reason of any undue influence exercised upon him by said N. V. Bilby or any other person; that said will was executed voluntarily by said Waco Bruner and was his own free act and

accord; that said Waco Bruner was a full-blood Creek Indian and duly enrolled as such, and by reason of being such full-blood Creek Indian, he was incapable of conveying the land purported to be conveyed and transferred by said will; and, as conclusions of law therein, said County Court held that said will thus conveying the allotment of said Waco Bruner to said N. V. Bilby should be denied probate "for the reason that said Waco Bruner is a full-blood Creek Indian, duly enrolled as such, and, as such Indian was prohibited by law from alienating or conveying the lands by will as to be devised
158 by said will"; and then decreed that said will be denied probate and held to be inoperative as a will and denied probate thereof, all of which will appear from the judgment of said county court therein; that said plaintiffs in error moved to set aside said judgment and grant them a new trial therein, which motion was overruled by said County Court, whereupon said matters were appealed to the District Court of said Hughes County, as provided by law in such matters.

Your petitioners further show to your Honor that said matters came on for trial in said District Court on or about the 15th of March, 1913, and was tried by said District Court; and in the trial thereof a jury was impaneled to pass upon the mental capacity of said Waco Bruner at the time of making said will and whether said will was procured by the use of undue influence of N. V. Bilby etc., whereupon the jury returned a verdict to the effect that such undue influence was so exercised and that said Waco Bruner at the time of the execution of said will did not have a sound and disposing mind and mental capacity to execute it; that said District Court set aside the verdict of said jury as to such undue influence, but declined to set the same aside as to the mental incapacity of said Waco Bruner and entered judgment denying the probation of said will, whereupon plaintiffs in error filed their motion therein to set aside said verdict of the jury and the judgment of said court, but said court, after sustaining said motion as to such undue influence, refused to set aside said judgment, whereupon an appeal therefrom was taken to the Supreme Court of said State, which is the highest court of said state having jurisdiction of said matters.

Your petitioners further show to your Honor that said cause came on to be finally heard and determined by said Supreme Court of said State on the 21st day of December, 1915, whereupon the judgment of said District Court was affirmed; that thereafter, to-wit: on January 5, 1916, plaintiffs in error filed their motion before said Supreme Court for a rehearing therein, and said rehearing came on to be heard by said Supreme Court on January 11, 1916, and was denied; whereupon your petitioners on the 19th of January, 1916, filed their application before said Supreme Court for leave to file another petition for rehearing in said matters, to which application the defend-
159 ants in error filed their answer, and said matters came on to be heard by said Supreme Court on February 29, 1916, and on said date were denied by said Supreme Court.

Now your petitioners further show to your Honor that the said Waco Bruner was a full-blood Creek Indian and so enrolled; that on

or about March 18, 1911, he made and executed his will and thereafter died in November, 1912, seized and possessed of his allotment comprising, The West Half of the Northwest Quarter of Section Eight (8), and the East Half of the Northeast Quarter of Section Nine (9), Township Six (6) North, Range Nine (9) East, situated in said Hughes County, which he devised to the plaintiff in error, N. V. Bilby by said last will and testament; that said will was denied probation by said County Court simply because said Waco Bruner was a full-blood Creek and so enrolled and because said lands in his hands were restricted and inalienable and by reason of state statute prohibiting the execution of a will by one incapable of conveying lands etc., thus holding said state statutes valid and binding and thereby prohibiting the alienation thereof by will, contrary to the express provisions of said Acts of Congress set up in said answer of the plaintiff in error in said matters and under which their rights and interests herein were thereby claimed, specially set up and relied upon; that under said respective Acts of Congress, and especially said Act approved on the 26th of April, 1906, and section 23 thereof and section 8 and 9 of the Act of May 27, 1908, Waco Bruner was legally and fully competent and thereby authorized to make and execute said last will and testament; that said Waco Bruner derived his power and authority to make and execute said will under said respective Acts of Congress and the plaintiffs in error procured and obtained their rights and interests under said will and the property embraced therein under and by reason of said Acts; that by the action of said County Court and said District Court in failing and refusing to probate said will said Waco Bruner was thereby denied the right, power and authority to make the same thus given him under said Acts of Congress and said plaintiffs in error were thereby denied their rights, title and interest in and to the property under said will, contrary to and in violation of said respective Acts of Congress.

160 Your petitioners further show to your Honor that said section 23 of said Act of Congress approved April 26, 1906, is as follows:

"Sec. 23. Every person of lawful age and sound mind may by last will and testament devise and bequeath all of his estate, real and personal and all interest therein: Provided, That no will of a full-blood Indian devising real estate shall be valid, if such last will and testament disinherits the parent, wife, spouse, or children of such full-blood Indian, unless acknowledged before and approved by a judge of the United States court for the Indian Territory, or a United States Commissioner."

That by reason of said section amended by section 8 of said Act of 1908, and said other Acts, said Waco Bruner was thus legally empowered by Congress to make and execute such will, provided he was "of lawful age and sound mind" and the same was acknowledged before and approved by a competent officer thus provided for. The will in this case was acknowledged before and approved by L. S. Fawcett, then a United States Commissioner, and Waco Bruner was of lawful age, as fully shown and disclosed by the testimony in this case. Every person is presumed in law to be sane and to have testa-

mentary capacity; and that presumption prevails until overcome by competent evidence to the contrary; that while the sanity or insanity or mental capacity sufficient to make a will may at times be a matter of fact, to be determined by competent evidence, it is still a proposition of law whether the evidence adduced to prove such insanity or mental incapacity is sufficient to establish that fact or has any probative force whatever; and the plaintiffs in error here most respectfully submit that the evidence adduced in this case to show or establish the testamentary incapacity of Waco Bruner is wholly insufficient in law to show that said Waco Bruner was of unsound mind at the time of executing said will on the 18th of March, 1911, and, if taken as true, without contradiction would not show or establish such testamentary incapacity and did not show the same, and therefore, both the verdict of said jury and the judgment of said District Court are contrary to the law governing this case and is without competent evidence to support the same, and therefore, said Waco Bruner was thereby denied his legal right to make and execute said will and the plaintiffs in error were thereby denied their rights, title, interest and estate under said will and to the property therein embraced
161 and disposed of, not only contrary to and in violation of said respective Acts of Congress, but likewise contrary to and in violation of the 14th Amendment to the Constitution of the United States, wherein it is provided:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

That in the record and proceedings in said case, it will appear there was drawn in question the construction and application of the 14th Amendment of the Constitution of the United States, or of a treaty, or statute, or commission held under the United States, and especially said two acts of Congress last named above; and that your petitioners claimed and set up their right, title and estate in and to said lands, under said Acts of Congress etc., and said judgment and decree of said district court, and the confirmation thereof, and decree and judgment therein rendered by, said Supreme Court of said State of Oklahoma, were against the right, title and interest of your petitioners, specially set up and claimed under said Acts of Congress and Constitution above mentioned; all of which is fully apparent in the proceedings and record of the case, and specially set forth in the assignment of errors filed herewith.

Wherefore, your petitioners pray that a writ of error be allowed, and that a transcript of the record, proceedings and papers upon which said orders, judgments and decrees were made, duly authenticated, be ordered sent to the Supreme Court of the United States, at Washington, D. C. under the rules of said court in such cases made and provided, that the same may be inspected and corrected as according to law and justice should be done.

LEWIS C. LAWSON,
Counsel for said Petitioners,
Holdenville, Okla.

Filed in my office, as Clerk of the Supreme Court of the State of Oklahoma, on this the 15 day of March, 1916.

WM. M. FRANKLIN,
Clerk of the Supreme Court
of the State of Oklahoma.

162 *Assignments of Error on the Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of Oklahoma.*

Filed Mar 15, 1916. William M. Franklin, Clerk.

Supreme Court of the State of Oklahoma.

NICHOLAS V. BILBY and H. B. MOFFITT, Plaintiffs in Error,
vs.
ALBERT STEWART, LUCY STEWART, WILLIE CORNELL, BEN REED, SAMPSON BUCK, and NATHAN STEWART, Defendants in Error.

Plaintiffs in error respectfully submit that this cause involves the validity and probation of the last will and testa*emtn* of Waco Bruner, dated March 18, 1911, who was a full-blood Creek Indian and died in November, 1912, seized and possessed of his allotment derived to him as a member of the Creek Tribe of Indians under the Original Creek Agreement, approved March 1, 1901, and the Creek Supplemental Agreement, approved June 30, 1902, and whose power and authority to make and execute said will and thereby dispose of said allotment was derived from said Agreements and another Act of Congress, approved April 26, 1906, and especially section 23 thereof and another Act of Congress approved May 27, 1908, and sections 8 and 9 thereof, which said Acts of Congress were specially set up and relied upon by the plaintiffs in error in their written answers to the protest or written objections of the defendants in error to the probation of said will; that the probation of said will and testament was denied by the County Court of Hughes County, State of Oklahoma, in which county said Waco Bruner lived and resided at the time of his death, because of a state statute, forbidding the execution of wills and disposition of restricted lands, which could not be alienated by the owners thereof during their lifetime, contrary to and in violation of said Acts of Congress; that from the judgment of said County Court therein, said plaintiffs in error appealed therefrom to the District Court of said Hughes
163 County, in which said matters came on for trial on the 15th day of March, 1913, and on the 22nd of March, 1913, said District Court, upon the trial thereof, denied the probation of said will "for the reason that said will was executed at a time when the said Waco Bruner did not possess a sound and disposing mind", as shown upon the face of said decree; that from said judgment and decree of said District Court the plaintiffs in error took an appeal to the Supreme Court of the State of Oklahoma, which is the highest

court of said state having jurisdiction in said matters, whereupon said matters came on for final decision by said Supreme Court finally decided on said date, affirming said judgment or decree of said District Court; that thereafter on January 5, 1916, said plaintiffs in error filed their petition for a rehearing in said matters before said Supreme Court and said rehearing coming on for further consideration on January 11, 1916, was by said Supreme Court denied; that thereafter said plaintiffs in error on January 19, 1916, filed their application before said Supreme Court for leave to file a second petition for a rehearing in said cause and said application coming on to be heard before said Supreme Court was denied on February 29, 1916.

Plaintiffs in error further show that said cause was tried in said District Court to a jury as to the mental capacity of said Waco Bruner at the time of executing said will and as to the undue influence of N. V. Bilby and others over him, as to the execution of said will, set up in the written protest or objections of said defendants in error to the probation of said will; that on the trial of said cause and after all of the testimony therein on behalf of both plaintiffs in error and defendants in error had been adduced on the trial thereof, counsel for said defendants in error, in open court, made the following admissions:

"By the COURT:

At the close of the evidence in the foregoing case and just before argument begun Mr. Skinner, as counsel for the contestants stated in open court that the Contestants admitted that the proponents had made out a prima facie case, and that the burden of proof was upon the contestants to show that there was undue influence used by the Beneficiary to procure Waco Bruner's will, and that the burden was upon the contestants to show that the Testator had not sufficient mental capacity to make a will, and this burden was voluntarily conceded by the contestants. And Mr. Skinner further stated that if
164 the contestants did not show this by a fair preponderance of the evidence, the contestants conceded that they were not entitled to prevail on the two questions submitted to the jury."

That the two facts submitted to said jury were:

"Did N. V Bilby use undue influence in order to procure Waco Bruner to make the alleged will?

"Did Waco Bruner at the time of the execution of the alleged will have a sound and disposing mind and mental capacity to execute it?"

To the first question the jury, in its verdict, answered "yes"; and to the second question it answered "no". The verdict of the jury in such matters, being simply advisory of the court and not at all binding upon the court, as so held in this particular case by said Supreme Court and other cases there cited, plaintiffs in error on March 17, 1913, moved said District Court to set aside said verdict or special finding and render judgment therein in favor of the plaintiffs in error, notwithstanding said verdict, upon various grounds among which was the legal force and effect of said admissions; that said verdict was contrary to the facts thus admitted by contestants and the legal consequences thereof; and was likewise contrary to the evidence

adduced in said cause and was wholly unsupported by the evidence therein adduced, and was not sustained by sufficient evidence, and was contrary to law etc., as shown by said motion; that said motion came on to be heard by said District Court on March 22, 1913, and was sustained by said District Court as to the undue influence exercised by the proponent, N. V. Bilby "and rejects the finding of the jury on that question for the reason that the evidence introduced in said cause does not sustain said finding"; but overruled said motion "relative to the mental condition of the mind of Waco Bruner, and makes the findings of the jury on that question the findings of the court" etc., as shown by said judgment, whereupon said plaintiffs in error moved to set aside said judgment of said District Court on March 24, 1913, for various reasons therein set forth, as follows:

"In re Estate of Waco Bruner, Deceased.

No. 1556.

Come now the proponents, H. B. Moffitt and Nicholas V. Bilby, on this the 24th day of March, 1913, and move the Court to set aside the judgment and decree rendered in said cause by the court on the 22nd day of March, 1913, and grant them a new trial herein, upon the following grounds and for the following reasons:

165 First. Because the Court erred in failing and refusing to sustain the motion of said proponents heretofore filed as to the verdict of the jury wherein said jury found that at the time said will of the said Waco Bruner was executed, the said Waco Bruner did not have testamentary capacity and was not at said time of sound mind; and for reason of this motion on said ground state that said verdict and judgment is not sustained by sufficient evidence to show that said decedent, at the time of making said will, was not of sound mind; but, on the contrary, proponents further state that the testimony of L. S. Fawcett, James A. Long, J. R. Dutton and H. B. Moffitt who were alone present at the time said will was executed, conclusively show and establish that, at the time said decedent executed said will, the said Waco Bruner was of sound mind and fully understood and comprehended his said will and the objects of his bounty in all respects necessary to execute a valid will and disposition of his property.

Second. Because the Court erred in overruling the said motion of said proponents to set a-*die* said verdict and findings of the jury and render a judgment herein in favor of said proponents probating said will, as therein prayed for, and in failing to pass upon the legal effect of said contestants admitting upon the record of the case after all the evidence in the case had been adduced that said proponents still had made a prima facie case for the probation of said will; and proponents hereby refer to said motion and ask that the same be read and considered herewith as part hereof as completely in every respect as if again set forth in hæc verba.

Third. Because the finding of the Court that at the time said decedent made said will he was not of sound mind is not sustained by

sufficient evidence in the case; but is contrary to the law and the evidence, adduced on the trial of the case.

Fourth. Because, after all the evidence had been herein adduced by proponents and contestants, said contestants conceded upon the record of the case that said proponents had still made out a prima facie c- which admission itself entitled said will to probate; and being thus entitled to probation, nothing thereafter could, or did, overcome such condition of the case at the close of the admission of the evidence therein, and said findings of the jury had no effec. whatever upon the right of the proponents to have said will probated, as the probation thereof from the time of such admission became a proposition of law, and not of fact; and said judgment of said court finding that at the time said will was thus executed said decedent was not of sound mind, is contrary not only to said admission and its legal effect, but likewise contrary to the law and the evidence taken in the case, as shown by the record herein.

Fifth. Because of the error of law occurring at the trial and duly excepted to by said proponents.

LEWIS C. LAWSON,
Counsel for said Proponents.

Endorsed: In re Estate of Waco Bruner, Dec. No. 1235. Motion for New Trial. Filed Mar. 24, 1913. G. W. Beavers, District Clerk, By Lloyd Thomas, Deputy."

That on said appeal, to said State Supreme Court, these matters were again presented by the plaintiffs in error in their peti-
166 tion in error, for the review of said Supreme Court, in the second, third, fourth, fifth and sixth assignments of error therein, which are as follows:

"Because the court erred in overruling the motion of the plaintiffs in error to set aside the ve-dict of said jury and grant them a new trial, or render judgment herein in their favor notwithstanding said verdict, on the grounds and for the reasons set forth in said motion which is hereby referred to and asked to be read and considered as part of this assignment, as fully and completely as if all the grounds therein contained were again set forth herein in hæc verba; and which said motion is to be found on pages 167, 168 and 169, and will be copied verbatim in the brief herein of plaintiffs in error.

Third. Because said court erred in overruling the motion of said plaintiffs in error to set aside said verdict of the jury and judgment of said court rendered herein refusing to probate said Last Will and Testament of said Waco Bruner, which said Motion is to be found on pages 173 and 174 of the Case-Made, and the same and each ground thereof is hereby referred to and asked to be read and considered herewith as fully and completely as if again set forth in hæc verba in this assignment of error.

Fourth. Because the court erred in holding, finding and adjudging that, at the time of executing said will, the said Waco Brunner did not have a sound and disposing mind, and in sustaining that part or

portion of said verdict of said jury wherein it found that at the time said will was so executed said Waco Brunner did not have a sound and disposing mind and mental capacity to execute it; because such verdict and judgment is contrary to the law and the evidence in this case; and is like wise not sustained "by a fair preponderance of the evidence", as was admitted by contestants must exist before they were entitled to a verdict or judgment in the case, as shown by said admission on page 157 of the record.

Fifth. Because said judgment and verdict is contrary to the evidence in this case, and the law governing its final determination and probation.

Sixth. Because of the numerous errors of law committed on the trial of the case and objected and excepted to by the plaintiffs in error as shown on the face of the record herein."

Plaintiffs in error further show that the right, power and authority of said Waco Bruner, being a full-blood Creek Indian and so enrolled, was derived from said respective Acts of Congress, and especially section 23 of said Act of Congress approved April 26, 1906, which is as follows:

"Sec. 23. Every person of lawful age and sound mind may by last will and testament devise and bequeath all of his estate, real and personal, and all interest therein: Provided, That no will of a full-blood Indian devising real estate shall be valid, if such last will and testament disinherits the parent, wife, spouse, or children of such full-blood Indian, unless acknowledged before and approved by a judge of the United States court for the Indian Territory, or a United States Commissioner.

167 That the right, title, interest and estate of the plaintiff in error in and to the lands involved in this suit and embraced in said last will and testament are likewise derived from said Acts of Congress, and were specially set up and relied upon by the plaintiffs in error in their answer to the written protests or objections of the defendants in error to the probation of said will, and were ever thereafter maintained and relied upon by said plaintiffs in error in all said matters and in said several state courts; that whether said Waco Bruner was of lawful age and sound mind at the time of so executing said will are likewise matters arising under said Acts and especially under said section 23, above set out, and are governed by the same and are therefore Federal questions arising in this proceeding; that said last will and testament was acknowledged before and approved by L. S. Fawcett, who was then a United States Commissioner, and by said acknowledgment and approval of said Commissioner, said Waco Bruner was thereby held and declared to be of lawful age and sound mind; and said acknowledgement and approval of said will by said Commissioner, being in due form, and under the procedure and authority of said Act of Congress, said last will and testament, when so approved by said Commissioner, thereby became entitled to probation; and the power and authority of said County Court of said Hughes County to probate said will was derived from and by reason of said Act of Congress, approved May 27, 1908, if, in fact, said County Court had any such authority or the proba-

tion of said will before said court was at all necessary; and that said County Court, said District Court and said Supreme Court of said state were alike bound by the terms and provision of said Acts of Congress, anything in the statutes of said state to the contrary of said Acts notwithstanding.

Plaintiffs in error further show that in its opinion, rendered in said cause, said Supreme Court of said state observed and held:

"It is next insisted that counsel for contestants made certain admissions, after the close of the testimony, that entitled the proponents to have the alleged will probated. The admissions were made while the court was considering the question as to who had
168 the right to open and close the argument, and the substance of the admissions are: That the contestants conceded that the proponents had made out a prima facie case, and that unless the contestants had overcome this, by a preponderance of the evidence, that the will should be admitted to probate. We see nothing in this admission that deprives the contestants of the right to have the question of testamentary capacity determined, upon consideration of all the evidence. There is no merit in this contention.

It is also insisted that the evidence is insufficient to support the finding of testamentary incapacity. The jury found, as above stated, that the alleged testator did not possess testamentary capacity. This finding was approved and adopted by the trial court, which had the effect of a finding of incapacity by the court, and we are called upon to say whether or not the evidence fairly and reasonably supports the finding. We think it does. The evidence upon the question of testamentary capacity is voluminous and sharply conflicting, and it would serve no useful purpose to set it out in detail. It is sufficient, however, to state that the deceased was a full blood Creek Indian; he died seized and possessed of no property other than his allotted lands; he was a bachelor about 45 years old; his father and mother were dead; he left no brothers or sisters surviving him, and the contestants are his nearest relatives. Bilby had been in possession of his lands for several years prior to his death, paying a small rental therefor; the deceased had no home, but stayed with his relatives, friends, and acquaintances, roaming from place to place; he was in bad health and had been for some time prior to his death, suffering with tuberculosis, and could not speak above a whisper; he spoke broken English, was uneducated, and knew practically nothing about the ordinary business affairs of life. From an examination of all the evidence, we are satisfied that the same fairly and reasonbly supports the court's finding of testmentary incapacity.

Testamentary capacity, or the lack thereof, is a question of fact. 40 Cyc. 1331; Gordon, et al., v. Gordon, et al. (Kans.) 142 Jac. 242. There is no rule by which it may be determined, with precision, where capacity ends and incapacity begins, but this question should be determined from all the facts and circumstances of each case. Ordinarily the test of testamentary capacity is the testator's capacity to understand the effect and consequences of his act at the time the will is executed. Wilkinson v. Service, et al., 249 Ill. 146, 94 N. E. 50, 22 A. & E. Ann. Cases, 41; Slaughter v. Heath, et al.,

127 Ga. 747, 57 S. E. 69, 27 L. R .A. (N. S.) 1, and note. Testator's incapacity having been determined upon evidence reasonably supporting the same, it will not be disturbed here. Gordon, et al., v. Gordon, et al., supra.

We think the parties had a fair trial, and the judgment of the trial court should be Affirmed.

Dec. 21 1915; By the Court: adopted in whole."

Plaintiffs in error, therefore, respectfully submit that in the record, proceedings, decisions, and final judgment and decrees of the Supreme Court of the State of Oklahoma, in the above entitled cause and matters, there are manifest errors in this, to-wit:

First. That said Supreme Court of said State of Oklahoma erred in said matter or cause that there was nothing in this admission of counsel for defendants in error, made at the close of the trial of said cause, that deprived the contestants of the right to have the
169 question of testamentary capacity determined upon the consideration of all the evidence; and that there was no merit in the contention of the plaintiffs in error that on said admissions the plaintiffs in error were entitled to a judgment probating said will, as said admissions presented a propostion of law, arising under said respective Acts of Congress, relating directly to the validity of said will and its probation.

Second. That said Supreme Court erred in holding that the evidence upon the question of testamentary capacity was voluminous and sharply conflicting, and that the evidence upon which the testator's incapacity had been determined was reasonably supported thereby, and that the parties to said proceedings had a fair trial, and in holding that the judgment of the trial court should be affirmed, and thereby denied the probation of said will, as the testamentary capacity of said Waco Bruner had been considered, passed upon and determined to be competent and sufficient to make and execute said will by said L. S. Fawcett, a United States Commissioner, in the approval of said will, which was executed under and by reason of said Acts of Congress and especially section 23 of the Act of April 26, 1906; and the power and authority of said Waco Bruner to make said will and the authority of said Commissioner to approve the same were derived from said Acts and section, the question of whether said Waco Bruner, at the time of making said will on March 18, 1911, was of lawful age and sound mind was one arising under said Acts of Congress whether the same be one of law or fact; and whether the evidence adduced on the hearing of said cause and especially by the defendants in error, to show testamentary incapacity of Waco Bruner at the time of making said will, was sufficient in law to establish such testamentary incapacity, presents a propostion of law arising under said Acts, and not a matter of fact; that said testimony so adduced to show such testamentary incapacity, being insufficient in law to show or establish such incapacity, there was no conflict in the testimony in that respect, as so held by said Supreme Court, and said will was thereby entitled to be probated by reason of said Acts of Congress, and the same having been denied by said Supreme Court,

the plaintiffs in error were thereby denied their rights, title,
170 interest and estate in and to the lands and other property mentioned and devised in said last will and testament, contrary to the terms and conditions of said Acts of Congress and their legal force and effect in such matters.

Third. That said Supreme Court erred in affirming said judgment of said District Court and thereby denied the probation of said will, and in so doing affirmed the action and ruling of the District Court in permitting the witness, John A. Jacobs, to testify that said Waco Bruner was of unsound mind, over the objections and exceptions of the plaintiffs in error, as shown by the record herein; and in holding in this cause that under the evidence adduced in the case the question of the testamentary capacity of Waco Bruner was one of fact and reasonably supported by the evidence, whereas under such evidence, the sufficiency thereof to establish testamentary incapacity, was a proposition of law arising under said Acts of Congress, and which evidence is wholly insufficient in law to establish such testamentary incapacity or to overcome the presumption of law that said Waco Bruner was of sound mind and possessed testamentary capacity at the time of making said will.

Fourth. That said Supreme Court erred in affirming said judgment of said District Court and thereby denied the probation of said will, and in holding that, under the evidence adduced in said cause, the question of the testamentary incapacity of Waco Bruner was one of fact and reasonably supported by such testimony, and not a proposition of law thereunder and in said cause, as shown by the record herein; and in so holding, the plaintiffs in error were thereby denied and deprived of all of their rights, title, interest and estate in and to the property mentioned and devised in said last will and testament, and the right to have said will and testament probated, contrary to and in violation of said respective Acts of Congress, and without due process of law, as made, provided and guaranteed to the plaintiffs in error in and under the 14th Amendment to the Constitution of the United States, wherein it is provided that:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall
any State deprive any person of life, liberty, or property,
171 without due process of law;; nor deny to any person within its jurisdiction the equal protection of the laws."

Fifth. That said Supreme Court erred in affirming the judgment and decree of said District Court, which denied the probation of said will alone on the grounds that the said Waco Bruner did not have testamentary capacity to make and execute said will at the time the same was so made and executed, contrary to the judgment and decree of the County Court of said Hughes County, to which court said will and testament was presented for probation and which alone had original jurisdiction of such matters and which, by its judgment and decree, held that under the laws of said state said will was duly made and executed and without undue influence, and that at the time of making the same "the said Waco Bruner possessed testamentary mental capacity;" but denied the probation thereof "for the reason

that said Waco Bruner is a full-blood Creek Indian, duly enrolled as such, and, as such Indian, was prohibited by law from alienating or conveying the lands by will asked to be devised by said will," under and by reason of Section 1 of Chapter 41 of the Session Laws of the State of Oklahoma, of 1909, page 641, which provides:

"That no person who is prevented by law from alienating, conveying or incumbering real property while living shall be allowed to bequeath same by will;" which said Act was thus held valid by said County Court, as against said respective Acts of Congress, and thereby because of said Act of said State said last will and testament was denied probation, and the plaintiffs in error were denied all their rights, title, interest and estate in the property mentioned and devised in said will, contrary to, and in violation of, said respective Acts of Congress.

Wherefore, said plaintiffs in error pray that the judgment and decision of said Supreme Court of the State of Oklahoma be reversed, annulled and altogether held for naught, and that plaintiffs in error be restored to all things which they have lost by this action and because of said judgment and decision of said court, and that said last will and testament be directed by this Honorable Court to be probated, as required by law and that plaintiffs in error be adjudged
in this Court the right to have said will legally probated and
172 that thereunder said N. V. Bilby be adjudged to the owner
in fee simple of the lands in controversy in this suit, under and by reason of said last will and testament; and that plaintiffs in error be adjudged their costs herein expended.

LEWIS C. LAWSON,
Counsel for Plaintiffs in Error, Holdenville, Okla.

Filed March 15, 1916.

WILLIAM M. FRANKLIN,
Clerk of the Supreme Court
of the State of Oklahoma.

173 *Order Allowing Writ of Error from the Supreme Court to the Supreme Court of the State of Oklahoma.*

Filed Mar. 15, 1916. William M. Franklin, Clerk.

The Supreme Court of the State of Oklahoma.

No. 5702.

NICHOLAS V. BILBY and H. B. MOFFITT, Plaintiffs in Error.
vs.
ALBERT STEWART, LUCY STEWART, WILLIE CORNELL, BEN REED, SAMPSON BUCK and NATHAN STEWART, Defendants in Error.

The above entitled matter coming on to be heard upon the petition of said plaintiffs in error therein for a writ of error from the Supreme

Court of the United States to the Supreme Court of the State of Oklahoma, and upon the examination of said petition and the record in said matter, and desiring to give said petitioners an opportunity to present in the Supreme Court of the United States the question presented by the record in said matters.

It is ordered that a writ of error be, and the same is hereby, allowed to this court from the Supreme Court of the United States, and that the bond be and the same is hereby, fixed at the sum of $500.00 to be given by said plaintiffs in error, or one or more of them, with surety and all other provisions, conditioned according to law in such cases.

This the 15 day of March, 1916.

MATTHEW J. KANE,
Chief Justice of the Supreme Court of the State of Oklahoma.

Attest:

[SEAL.] WM. M. FRANKLIN,
Clerk of the Supreme Court of the State of Oklahoma.

174 Know all men by these presents, That we, Nicholas V. Bilby, as Principal, and R. Hardy and B. R. Templeman, as sureties, are held and firmly bound unto Albert Stewart, Lucy Stewart, Willie Cornell, Ben Reed, Sampson Buck and Nathan Stewart in the full and just sum of Five Hundred ($500.00) dollars, to be paid to the said Albert Stewart, Lucy Stewart, Willie Cornell, Ben Reed, Sampson Buck and Nathan Stewart certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this — day of March, in the year of our Lord one thousand nine hundred and sixteen.

Whereas, lately at a recent term of the Supreme Court of the State of Oklahoma in a suit pending in said Court, between Nicholas V. Bilby and H. B. Moffitt, as plaintiffs in error and Albert, Lucy Stewart, Willie Cornell, Ben Reed, Sampson Buck and Nathan Stewart, as defendants in error a judgment or decree was rendered against the said Nicholas V. Bilby and H. B. Moffitt and the said Nicholas V. Bilby and H. B. Moffitt having obtained a writ or error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Albert Stewart, Lucy Stewart, Willie Cornell, Ben Reed, Sampson Buck and Nathan Stewart citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof.

Now, the condition of the above obligation is such, That if the said Nicholas V. Bilby and H. B. Moffitt shall prosecute said writ of error to effect, and answer all damages and costs if they fail to make their

plea good, then the above obligation to be void; else to remain in full force and virtue.

175 NICHOLAS V. BILBY [SEAL.]
R. HARDY, [SEAL.]
B. R. TEMPLEMAN. [SEAL.]

Sealed and delivered in presence of

____ ____
____ ____
____ ____

Approved by—
MATTHEW J. KANE,
Chief Justice of the Supreme Court of the State of Oklahoma.

STATE OF OKLAHOMA,
Hughes County, ss:

R. Hardy and B. R. Templeman, being each duly sworn, on oath depose and say: We are each of lawful age and are citizens of the State of Oklahoma, and know the contents of the foregoing instrument to which we have attached our names. We each for himself say we are worth the sum of Five Hundred Dollars over and above all debts, liabilities and exemptions.

R. HARDY,
B. R. TEMPLEMAN.

Subscribed to and sworn to before me this March 14th, 1916.
[SEAL.] V. W. SNIDER,
Notary Public, Hughes County, Oklahoma.

My commission expires: July 31, 1916.

Bond approved, and to operate as a supersedeas.
Dated March 15, 1916.

MATTHEW J. KANE,
Chief Justice, Supreme Court of Oklahoma.

Filed Mar. 15, 1916.

176 In the Supreme Court of the State of Oklahoma.

Certificate.

I, William M. Franklin, Clerk of the Supreme Court of the State of Oklahoma, do hereby certify that the foregoing 175 pages, numbered from 1 to 175, both inclusive, are a full, true and complete transcript of the record, as called for by the præcipe for parts of the record filed by the plaintiff in error, in cause No. 5702, Nicholas V. Bilby and H. B. Moffitt, Plaintiffs in error, vs. Albert Stewart et

al., Defendants in error, as the same remain of record and on file in my office.

In witness whereof, I hereto set my hand and affix the seal of said Supreme Court of the State of Oklahoma, this 4th day of April, 1916.

[Seal of the Supreme Court, State of Oklahoma.]

WM. M. FRANKLIN,
Clerk of the Supreme Court of the State of Oklahoma.

Endorsed on cover: File No. 25,283. Oklahoma Supreme Court. Term No. 476. Nicholas V. Bilby and H. B. Moffitt, plaintiffs in error, vs. Albert Stewart, Lucy Stewart, Willie Cornell, Ben Reed, Sampson Buck and Nathan Stewart. Filed May 8th, 1916. File No. 25,283.

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Page

probate or other courts of the State of Oklahoma, jurisdiction in such matters, or authority to require such wills probated and thereby subject to the laws of Oklahoma pertaining to the probation of wills of other citizens under its jurisdiction, and as in such laws provided? And, **third**, even if such state courts had jurisdiction of such Indian matters, does the testimony taken in this case and found in the record, show or establish, as a matter of law or fact, that, at the time said will was executed, Waco Bruner did not possess testamentary capacity sufficient to make said will; and were the finding of such fact by the court and jury, and said judgments refusing to probate such will, sustained by the law and the evidence in this case?. 113

The case of Campbell v. Prophet, (Okla.) 153 Pac. 839, the testimony in which is so closely akin to that of the case at bar, that the opinion is set out in full. 126

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Third Assignment of Error.—This assignment is: That said Oklahoma Supreme Court erred in affirming said judgment of said District Court and thereby denied the probation of said will, and in so doing affirmed the action and ruling of said District Court in permitting the witness, John A. Jacobs, to testify that said Waco Bruner was of unsound mind, over the objections and exceptions of the plaintiffs in error, as shown by the record herein; and in holding in this cause that under the evidence adduced in the case, the question of the testamentary capacity of Waco Bruner was one of fact and reasonably supported by the evidence, whereas under such evidence, the sufficiency thereof to establish testamentary incapacity, was a proposition of law arising under said Acts of Congress, and which evidence is wholly insufficient in law to establish such testamentary incapacity or to overcome the presumption of law that said Waco Bruner was of sound mind and possessed testamentary capacity at the time of making said will. 177

Fourth Assignment of Error.—This assignment is to the effect that, by said decisions of the state courts, the plaintiffs in error were denied all their right, title, interest and estate in and to the property mentioned and devised in said will, and the right to have said will probated, if proper and necessary, contrary to the provisions of said acts and the 14th

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Fifth Assignment of Error.—This assignment presents that said judgments of said District and Supreme Courts were erroneous because contrary to the facts found by the County Court which was the court of original jurisdiction in probate matters; and that the judgment of said County Court in refusing to probate said will because of said state statute was erroneous because said Acts of Congress governed such matters.181

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tion 8, and the E2 of the NE4 of section 7, township 6 north, range 9 east, comprising one hundred sixty acres, situated in Hughes County, State of Oklahoma; that said Bruner died seized and possessed of said lands on the 21st day of November, 1912; that on the 18th of March, 1911, the said Waco Bruner executed his Last Will and Testament, under and by reason of section 23 of the Act of Congress, approved the 26th day of April, 1906, and sections 8 and 9 of another Act of Congress approved on the 27th day of May, 1908, whereby he devised said lands to the plaintiff in error, Nicholas V. Bilby, and in which will he made as the executor thereof the plaintiff in error, H. B. Moffett, and is shown in the record from pages 5 to 7, inclusive.

Waco Bruner had no close relatives living at the time of his death, and he himself had never married and had no children and his father and mother had died long prior to his death and before he made his will. So in his will he left his uncle, defendant in error Albert Stewart $10.00; his aunt, the defendant in error, Lucy Stewart $10.00; and his nephew, the defendant in error Ben Reed $10.00; and to said Nicholas V. Bilby all the balance and residue of his estate both real and personal. (Rec., p. 6.)

H. B. Moffett presented his petition to the County Court of Hughes County, Oklahoma, for the pro-

bation of said will, after the death of said Bruner, whereupon the probation thereof was contested by the defendants in error: *1st* because said Waco Bruner was a full-blood Creek citizen and so enrolled and had no right to make said will and was prohibited under the state statute from alienating, conveying or incumbering said lands in his lifetime, and had no right to make said will and that it was "therefore void and a nullity"; *2nd* that said will was not executed, attested and witnessed as by law required; *3rd* that said will was procured by fraud practiced upon said Bruner by N. V. Bilby and others working for him and in his behalf; *4th* that at the time of making said will undue influence was exercised over and upon said Brunner by said Bilby, etc.; *5th* that at the time of making said will, said Bruner was not of sound mind; "that he was incapable of properly appreciating the objects of his bounty; that he was weak minded, easily influenced and incapable of forming an intelligent conception of his property and the objects of his bounty"; *6th* that contestant was of Indian blood and a blood relative of said Bruner and that said Bilby is not of Indian blood, "*hails from the State of Nebraska*" and is no relation to said Brunner "who is a full-blood Creek Indian," and that "*the purported gift purported to be bequeathed by said will is against nature and justice.*" (Rec., pp. 7 and 8.)

Plaintiffs in error filed their reply to this written protest, denying all the contestable matters set up therein, but admitted the said Bruner was a full blood Creek Indian and so enrolled, and then set up that said state statutes relied upon by said contestants were in open violation of the Acts of Congress specifically set forth in said reply and were therefore null and void and had no application in such matters. (Rec., pp. 8, 9 and 10.) These acts there set up embraced the Original and Supplemental Creek Agreements, the Acts of April 26th, 1906, and of May 27th, 1908, and certain sections thereof therein given. So that these Acts of Congress were presented by plaintiffs in error on the probation of said will before said county court and ever thereafter to the present time, and they are now before this court for its consideration in such matters and from which, and the fact that Waco Bruner was a full-blood Creek Indian and so enrolled and a member of the Creek Tribe of Indians and derived his power and authority to make said will as provided in section 23 of said Act of April 26th, 1906, and section 8 of said Act of 1908, etc., this court obtains its jurisdiction to hear and determine these matters, as we will show in the argument of this case.

The probate court of said county heard the matters thus presented on the probation of the will, on

the 16th of January, 1913, making its findings of facts as follows:

> " The court finds as a fact that the will filed herein for probate, bearing date of the 18th day of March, 1911, purporting to be executed by the said Waco Bruner, was in all respects properly executed and attested by witnesses thereto as by law required. The court further finds that at the time of the execution of the said purported will, the said Waco Bruner possessed testamentary mental capacity and did not execute said will by reason of any undue influence exercised upon him by said N. V. Bilby or any other person. The court further finds that the making of said will by said Waco Bruner was done voluntarily and was his own free act and accord. The court further finds as a fact that the said Waco Bruner was a full-blood Creek Indian and duly enrolled as such, and by reason of being such full-blood Creek Indian, he was incapable of conveying the lands purported to be conveyed and transferred by said will."

And its conclusion of law therein was as follows:

> " Upon the above findings of fact herein, the court concludes as a matter of law, that the will filed herein, executed by Waco Bruner, conveying the allotment of said Waco Bruner to N. V. Bilby, should be denied probate for the reason that said Waco Bruner is a full-blood Creek Indian, duly enrolled as such, and, as such Indian, was prohibited by law from alienating or con-

veying the lands by will asked to be devised by said will."

The judgment then closed, as follows:

"It is therefore considered, ordered and adjudged and decreed by the court that said will filed herein be, and the same is hereby denied probate and held to be inoperative as a will and is by the court rejected as such will. It is further ordered and adjudged by the court that the proponent, N. V. Bilby, pay the cost of this action.

"Given under my hand this the 16th day of January, A. D. 1913.

"J. Ross Bailey, *County Judge.*"

(Rec., pp. 10 and 11.)

From this judgment and decree both sides took an appeal to the District Court of said Hughes County, as provided by the law of said state; and when the matters came on for trial in said District Court, the case was submitted to a jury to pass upon two facts, namely:

"Did N. V. Bilby use undue influence in order to procure Waco Bruner to make the alleged will?"

"*Second.* Did Waco Bruner at the time of the execution of the alleged will have a sound and disposing mind and mental capacity to execute it?"

The jury returned their verdict of "yes" to the first question, and "no" to the second; thus deciding both matters against the probation of the will. (Rec., p. 12.) On the return of this verdict the plaintiffs in error moved the court to set aside said verdict or special finding of the jury, and either grant them a new trial or render judgment therein regardless of said special finding:

1st. Because such matters are devolved upon the court to determine and not upon a jury, and it becomes the duty of the court to determine them regardless of the verdict of a jury, etc.

2nd. Because after all the evidence was in and said cause was ready to be argued and submitted, counsel for said contestants admitted of record that proponents had still made out a prima facie case in favor of proponents and therefore could not thereafter be overcome, and entitled said will to probation, etc.

3rd. Because said verdict was contrary to such admission and the evidence in the case and was not supported by the evidence, etc.

4th. Because the court erred in refusing to give certain instructions, etc.

5th. Because said verdict and special findings of the jury, was contrary to the law and the evidence was not sufficient to sustain it.

6th. Because of errors of law occurring at the trial, etc.

On the 22nd of March, 1913, the District Court heard said motion and sustained the same as to the finding of the jury that said will was procured by undue influence, and set that part aside as not supported by any evidence. But overruled said motion relative to mental condition of the mind of Waco Bruner at the time of making said will, and made the finding of such fact by said jury the finding of the court, and denied the probation of the will, and remanded the case to said County Court for final judgment therein. (Rec., pp. 12 and 13.) Thereupon the plaintiffs in error filed their motion to set aside said judgment of said District Court:

1st. Because the court erred in failing and refusing to sustain said prior motion as to the mental capacity of Waco Bruner as well as to undue influence, etc.

2nd. Because the court erred in overruling said motion and decreeing against the probation of said will, without passing upon said admission of counsel for said contestants that plaintiffs in error had still made out a prima facie case on the closing of said testimony, etc.

3rd. Because "*the finding of the court that at the time said decedent made said will he was not of sound mind is not sustained by sufficient evidence in the case; but is contrary to the law and evidence, adduced on the trial of the case*".

4th. "Because after all the evidence had been herein adduced by proponents and contestants, said contestants conceded upon the record of the case that said proponents had still made out a *prima facie* case, which admission itself entitled said will to probate; and being thus entitled to probation, nothing thereafter could, or did, overcome such condition of the case at the close of the submission of the evidence, and said findings of the jury had no effect whatever upon the rights of the proponents to have said will probated", etc.

As fully shown on pages 15 and 16 of the record.

But said District Court overruled this motion also, whereupon plaintiffs in error removed the case to the Supreme Court of said state by petition in error as provided by law of said state and the same came on for final decision before said court on the 21st of December, 1915, and was affirmed. Plaintiffs in error filed their petition for a rehearing in that court on the 19th of January, 1916, shown on pages 94 and 95 of the record; that prior to that time, they had filed their petition for a rehearing and been denied,

and said last petition was also denied, as shown on page 97 of the record.

From this decision of said Supreme Court, this case is now brought before this honorable court for final decision by a writ of error, on the following

Assignments of Error.

First.

That said Supreme Court of the State of Oklahoma erred in said matter or cause that there was nothing in said admission of counsel for defendants in error, made at the close of the trial of said cause, that deprived the contestants of the right to have the question of testamentary capacity determined upon the consideration of all the evidence; and that there was no merit of the plaintiffs in error that on said admission the plaintiffs in error were entitled to a judgment probating said will, as said admission presented a proposition of law, arising under said Acts of Congress, relating directly to the validity of said will and its probation.

Second.

That the Supreme Court erred in holding that the evidence upon the question of testamentary capacity was voluminous and sharply conflicting, and

that the evidence upon which the testator's incapacity had been determined was reasonably supported thereby, and that the parties to said proceedings had a fair trial, and in holding that the trial court should be affirmed, and thereby denied the probation of said will, as the testamentary capacity of said Waco Bruner had been considered, passed upon and determined to be competent and sufficient to make and execute said will by said L. S. Fawcett, a United States Commissioner, in the approval of said will, which was executed under and by reason of said Acts of Congress and especially section 23 of the Act of April 26, 1906; and the power and authority of said Waco Bruner to make said will and the authority of said Commissioner to approve the same were derived from said acts and section, the question of whether said Waco Bruner, at the time of making said will on March 18, 1911, was of lawful age and sound mind was one arising under said Acts of Congress whether the same be one of law or fact; and whether the evidence adduced on the hearing of said cause and especially by the defendants in error, to show testamentary incapacity of Waco Bruner at the time of making said will, was sufficient in law to establish such testamentary incapacity, presents a proposition of law arising under said acts, and not a matter of fact; that said testimony so adduced to show such testamentary incapacity, being

insufficient in law to show or establish such incapacity, there was no conflict in the evidence in that respect, as so held by said Supreme Court, and said will was thereby entitled to be probated by reason of said Acts of Congress, and the same having been denied by said Supreme Court, the plaintiffs in error were thereby denied their rights, title, interest and estate in and to the lands and other property mentioned and devised in said last will and testament, contrary to the terms and conditions of said Acts of Congress and their legal force and effect in such matters.

Third.

That said Supreme Court erred in affirming said judgment of said District Court and thereby denied the probation of said will, and in so doing affirmed the action and ruling of the District Court in permitting the witness, John A. Jacobs, to testify that said Waco Bruner was of unsound mind, over the objections and exceptions of the plaintiffs in error, as shown by the record herein; and in holding in this case that under the evidence, adduced in the case the question of the testamentary capacity of Waco Bruner was one of fact and reasonably supported by the testimony, whereas, under such evidence, the sufficiency thereof to establish testamentary incapacity, was a proposition of law arising under said Acts of

Congress, and which evidence is wholly insufficient in law to establish such testamentary incapacity or to overcome the presumption of law that said Waco Bruner was of sound mind and possessed testamentary capacity at the time of making said will.

Fourth.

That said Supreme Court erred in affirming said judgment of said District Court and thereby denied the probation of said will, and in holding that, under the evidence adduced in said cause, the question of the testamentary incapacity of Waco Bruner was one of fact and reasonably supported by such testimony, and not a proposition of law thereunder and in said cause, as shown by the record herein; and in so holding, the plaintiffs in error were thereby denied and deprived of all their rights, title, interest and estate in and to the property mentioned and devised in said last will and testament, and the right to have said will and testament probated, contrary to and in violation of said respective Acts of Congress, and without due process of law, as made, provided and guaranteed to the plaintiffs in error, under the 14th Amendment of the Constitution of the United States, wherein it is provided that:

> " No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any

state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Fifth.

That said Supreme Court erred in affirming the judgment and decree of said District Court, which denied the probation of said will alone on the ground that the said Waco Bruner did not have testamentary capacity to make and execute said will at the time the same was so made and executed, contrary to the judgment and decree of the County Court of said Hughes County, to which court said will and testament was presented for probation and which alone had original jurisdiction of such matters and which, by its judgment and decree, held that under the laws of said state said will was duly made and executed and without undue influence, and that at the time of making the same "the said Waco Bruner possessed testamentary mental capacity"; but denied the probation thereof "for the reason that said Waco Bruner is a full-blood Creek Indian, duly enrolled as such, and, as such Indian was prohibited by law from alienating or conveying the lands by will asked to be devised by said will" under and by reason of section 1 of chapter 41 of the Session Laws of the State of Oklahoma, of 1909, page 641, which provides:

> " That no person who is prevented by law from alienating, conveying or incumbering real property while living shall be allowed to bequeath same by will."

Which said act was thus held valid by said County Court, as against said respective Acts of Congress, and thereby because of said act of said state said last will and testament was denied probation, and the plaintiffs in error were denied all their rights, title, interest and estate in the property mentioned and described in said will, contrary to, and in violation of, said respective Acts of Congress.

ARGUMENT AND CITATION OF STATUTES AND DECISIONS GOVERNING THIS CASE.

Statutes.

The power and authority of a full-blood Indian of the Five Civilized Tribes to execute a will and dispose of his restricted lands and property, as it existed at the time the will in this case was made in March, 1911, are derived from section 23 of the Act of Congress of April 26, 1906, and sections 8 and 9 of the Act of Congress of May 27, 1908. Said section 23 is as follows:

"*Sec. 23.* Every person of lawful age and sound mind may by last will and testament devise and bequeath all of his estate, real and personal, and all interest therein: *Provided,* That no will of a full-blood Indian devising real estate shall be valid, if such last will and testament disinherits the parent, wife, spouse or children of such full-blood Indian, unless acknowledged before and approved by a judge of the United States Court for Indian Territory, or a United States Commissioner."

Said section 8 is as follows:

"*Sec. 8.* That section twenty-three of an act entitled 'An act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes,' approved April twenty-sixth, nineteen hundred and six, is hereby amended by adding at the end of said section, the words 'or a judge of a county court of the State of Oklahoma'."

Section 9 thereof provides for a disposition of the homestead under conditions therein mentioned, but which do not at all enter into this case.

Section 1 of Chapter 41 of the Acts of Oklahoma, 1909.

That part of this section in conflict with the Federal laws above quoted is as follows:

"Provided, that no person who is prevented by law from alienating, conveying or encumbering real property while living shall be allowed to bequeath same by will."

By reference to the reply of the plaintiffs in error found on pages 8, 9 and 10 of the record, it will be seen that the plaintiffs in error set up these Acts of Congress and the invalidity of this state statute (because in violation of these Federal laws) before the County Court at the probation of this will. So these matters arising from such statutes, state and federal, have been before all the courts before which this case has come, and have been relied upon by the plaintiffs in error at every stage of the case, and are now presented to this court on their behalf, in the assignments of error. From the judgment of the County Court of said county, the court will observe the sole and only reason why that court did not probate this will was because of the provisions of this state statute, holding and deciding that the will was valid in every other particular and that Waco Bruner was then of sound mind and memory and was not unduly influenced to make said will by said N. V. Bilby or any one else. Thus, the county court held said state statute valid as against these federal acts and gave judgment thereon against the plaintiffs in error in refusing to probate said will and thus defeated their rights thereunder. That this

position of said county court was clearly erroneous and wholly untenable, will not likely be denied or disputed before this court. But, as that feature was not decided or considered either by the District or Supreme Court of said state in this case, but rested their decisions upon the mental incapacity of the testator alone, we need not consider that matter any further.

Jurisdiction of This Court in This Case.

In the written contest of the defendants in error it is set up that Waco Bruner was a full-blood Creek Indian and so enrolled; and the same is admitted by the plaintiffs in error and so found by the courts. It is also set up that the lands involved and thus devised by said will are the individual allotment of said Bruner and possessed by him at the time of his death; and that this land was all the property owned or possessed by him at the time of his death, and was devised to the plaintiff in error, N. V. Bilby, under this will. So, the case came before the courts, and is now before this court, with two facts conclusively settled, namely: *1st* that Waco Bruner was a full-blood Creek Indian, and so enrolled; *2nd* that the lands involved were his individual allotment derived by him out of the Creek Nation under said Acts of Congress mentioned in the reply of the plaintiffs

in error, and governed by the terms and provisions of said acts both while living and at the time of his death. The alienation of such lands was forbidden by section 19 of said Act of April 26, 1906, and section 1 of said Act of May 27, 1908. But by section 23 of the first named act above set forth, Waco Bruner was empowered to dispose of said lands by his last will and testament by complying with the provisions of said section. This was done in the execution of said will by the same being reduced to writing and the will acknowledged by him before L. S. Fawcett, a United States Commissioner, who approved the same, as may be seen by an inspection of said will on page 7 of the record.

It is therefore apparent that this will and the power and authority enjoyed by Waco Bruner to make the same, arise directly from these federal acts. The probation of this will has thus been denied by the courts of the State of Oklahoma; and all the rights and interests of the plaintiffs in error arising under this will were thus of federal origin, and have thus been denied them by these state courts in refusing to probate that will, if probation thereof before said courts was, in fact, necessary to perfect the will and pass the title to the lands thereby devised. If not so necessary, said respective judgments are void; but are such clouds upon the title to said lands as to greatly destroy the market value

thereof, and has so operated as to prevent the beneficiary, Nicholas V. Bilby, from obtaining the possession of said lands through said judgments, etc.

These matters and judgments would seem to bring this case squarely within the express provisions of section 237 of the Judicial Code, and present a case clearly within the jurisdiction of this court. The case of *Taylor* v. *Parker et al.*, 59 Law. ed. 121, involved a Chickasaw Indian's will made before this Act of 1906 was passed, and the question there was whether said will was valid under the Supplemental Agreement with the Choctaws and Chickasaws, ratified by Congress on July 1, 1902. In that case, it is pointed out that under section 23 of the Act of 1906 and the Act of 1908, these Indians had the power to dispose of their allotments by will. So that, upon *this* feature of the case it would seem, there remains no doubt of the jurisdiction of this court to hear and determine this case.

But, it may be suggested that inasmuch as the probation of this will was denied by these appellate state courts on the ground that at the time of so executing said will said Waco Bruner had not testamentary capacity to make the same, that is purely a finding of *fact*, and not of *law*, and consequently, this court will not take cognizance of the case or review the evidence to determine whether the holdings

of these state courts were right or wrong; and, therefore, refuse to take jurisdiction of the matters involved. Before going into this particular aspect of the case, which we will discuss later, we desire to call the attention of the court to some other features which enter into this whole case.

Section 23 of this Act of 1906, provides that:

> " Every person of *lawful age* and *sound mind* may by last will and testament devise and bequeath all his estate, real and personal, and all interest therein" etc.

Here, it is apparent that before such a will as there provided for, can be valid, two things are actually necessary, namely: *1st* he must be "*of lawful age;*" *second,* he must be "of *sound mind,*" before he can make such a will and testament. Then, if he disinherits his children, wife, parents, etc., he must acknowledge the will before, and have it approved by, a United States Commissioner or other officer mentioned in said section. Without such acknowledgment and approval in such a case, no one would suppose for a moment that such a will, although executed in all due form, would be valid or pass the title to his restricted lands even though the same was probated in solemn form. Then, what does the probation of such an Indian will, executed according to said Acts of Congress, have to do with it? Does it

add anything to the will, or take anything from it, by being thus probated under the laws of the State of Oklahoma? In other words, do such wills have to be probated in said state before they become effectual to transmit the property devised and bequeathed thereby? The county courts of this state have exclusive original jurisdiction in the probation of wills by reason of the provisions of the state constitution. But the probate jurisdiction of these county courts do not extend to these Indian wards of the government or their property further than has been given by sections 22 of the Act of 1906 and 2, 6 and 9 of this Act of Congress of May 27, 1908, *Jefferson* v. *Winkler*, 26 Okla. 653; *Bell* v. *Fitzpatrick*, 157 Pac. ...., and cases there cited. In these decisions the jurisdiction of the state courts respecting these Indian matters, is largely defined or construed by our Supreme Court; and in *Wilson* v. *Morton*, 29 Okla. 745, 119 Pac. 213, that court in considering said section 22 of the Act of 1906, strongly intimates that said section prescribed the only procedure by which alone the lands of Indian minors could be sold while that act was in force. That decision points out that this was the method for such sale prescribed by Congress. In *Stephens* v. *Smith*, 19 Law ed. 933, which pertained to the conveyance of restricted Indian lands, this court, in effect, held that where Congress prescribed the way and manner in which such

Indian lands could be alienated, that, by necessary implication, precluded any other mode, means or method of alienation, and rendered all other attempted conveyances null and void. So long as tribal relations exist and the Indians remain wards of the government, Congress has plenary power over them and their property, *Lone Wolfe* v. *Hitchcock*, 47 Law. ed. 299; *Tiger* v. *Western Inv. Co.*, 55 Law ed. 738; and it is for Congress alone to determine when that guardianship shall cease and the conditions on which it terminates, *Jefferson* v. *Winkler, supra; United States* v. *Sandoval*, 58 Law. ed. 107; *United States* v. *Nice*, 60 Law ed. page 1195 and cases there cited. The right to control, and with it the duty to protect and safeguard, these Indians and their property, are, therefore, sovereign powers of this government derived from the Constitution of the United States; and by reason of such powers and duties, the government may institute such suits or actions as it deems proper in the name of the United States, concerning their restricted lands or property or rights pertaining thereto, *Heckman* v. *United States*, 56 Law ed. 820; *Mullen* v. *United States*, 56 Law ed. 834; *Bowling* v. *United States*, 56 Law ed. 1080; *United States* v. *Noble*, 59 Law. ed. 844. This sovereign power over these Indians and their property thus vested in Congress under the Constitution remains in the Federal Government until devested or dele-

gated by its own enactments; and this may be done in whole or in part and on such conditions as Congress may deem proper, *U. S.* v. *Nice, supra.* After once delegating such powers to some person or tribunal, Congress may repeal and nullify that power and again reserve it absolutely to Congress alone, as was done by section 19 of the Act of 1906, respecting the removal of restriction on restricted Indian lands; or it may delegate such powers to some public officer to be performed under such rules and regulations as he may prescribe, as evidenced in section 7 of the Original and section 16 of the Supplemental, Agreements of the Creek Nation, and the Act of April 21st, 1904, and section 1 of the Act of 1908, wherein the Secretary of the Interior could remove restrictions; and by section 22 of the Act of April 26, 1906, whereby he could approve the deeds of full-blood Indians to their inherited lands. This may be delegated to some tribunal, as done in section 9 of the Act of 1908, whereby the County Court of Oklahoma, having jurisdiction of the settlement of the estate of the deceased Indian, may approve conveyances of full-blood Indian heirs to their inherited property.

Delegation of Sovereign Powers and Authority.

In the very able and learned decision of the Supreme Court of Oklahoma, in *Brader* v. *James,* 154 Pac. 560, delivered by Justice SHARP, it was observed:

> " Powers, rights and interests of sovereignty are never relinquished by mere lapse of time or by implication. Once rightfully established and asserted, they are presumed to exist, and to continue to exist, until abandoned by express terms. This principle applies alike to prerogatives of the executive, powers of the legislative, and the jurisdiction of the courts. *United States* v. *Knight,* 14 Pet. 301, 10 L. ed. 465; *United States* v. *Herrorn,* 20 Wall. 251, 22 L. ed. 275. As expressed in *Wheeling & Belmont Bridge Co.* v. *Wheeling Bridge Co.,* 138 U. S. 278, 11 Sup. Ct. 301, 34 L. ed. 967:
>
> > " 'An alleged surrender or suspension of a power of government respecting any matter of public concern must be shown by clear and unequivocal language; it cannot be inferred from any inhibitions upon particular officers, or specific tribunals or from any doubtful or uncertain expressions'."

This decision and citations might have been reinforced with *Charles River Bridge* v. *Warren Bridge,* 9 L. ed. 773, 824, to the same effect. The opinion in this *Brader* case is a very exhaustive and learned discussion and consideration of these Indian matters, and extends to a review of the powers and

authority of Congress over these Indians and their affairs both before, and since, statehood of Oklahoma; and holding that by reason of section 1 of the Enabling Act, and after the Acts of 1906 and 1908, Congress still has plenary powers over these tribes; and that:

> " Congress, in the exercise of its constitutional authority, and while the guardianship relation over full-blood Indians continues, may impose restrictions on full-blood Indian heirs, requiring that conveyances by them of inherited allotted lands be approved by the Secretary of the Interior; and this, notwithstanding the restrictions imposed by prior legislation have expired by limitation, or by the death of the allottee."

Where Statutory Power or Authority Is Conferred Upon a Particular Person and Left to His Discretion, His Judgment Upon the Facts is Final.

In *Martin* v. *Mott*, 6 L. ed. 541, this court held:

> " Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts."

This decision was again adhered to and cited with approval and followed by this court in *Mullen* v. *United States*, 35 L. ed. 491, and is made the 4th point of the syllabus of that case; and in *United States* v. *California & Oregon Land Co.*, 37 L. ed. 360, this court further held:

> " Now, it is familiar law that when jurisdiction is delegated to any officer or tribunal, his or its determination is conclusive. Thus, in the case of *United States* v. *Arredondo*, 31 U. S. 6 Pet. 691, 729 (8: 547, 561), this court said: 'It is an universal principle that, where a power or jurisdiction is delegated to any officer or tribunal over a subject-matter, and its exercise is confided to him or their discretion, the acts so done are binding and valid as to the subject-matter; and individual rights will not be disturbed collaterally for any thing done in the exercise of that discretion within the authority and power conferred. The only questions which can arise between an individual claiming a right under the acts done, and the public, or any person denying its validity, are, power in the officer, and fraud in the party. All other questions are settled by the decision made or act done by the tribunal or officer; whether executive (*Marbury* v. *Madison*, 5 U. S. 1 Cranch 170, 171 (2: 71)), legislative (*McCullock* v. *Maryland*, 17 U. S. 4 Wheat. 423 (4: 605); *Satterlee* v. *Matthewson*, 27 U. S. 2 Pet. 412 (7: 468); *Providence Bank* v. *Billings*, 29 U. S. 4 Pet. 563 (7: 956)); judicial (*Perkins* v. *Fairfield*, 11 Mass. 227; *McFerson* v. *Crenliff*, 11

Serg. & S. 2 Pet. 167, 168 (7: 385)), or special (*Rogers* v. *Bradshaw*, 20 Johns. 739, 740; *Shand* v. *Henderson*, 2 Dow. P. C. 521, etc.), unless an appeal is provided for, or other revision, by some appellate or supervisory tribunal, is prescribed by law.' See also the following cases: *Foley* v. *Harrison*, 56 U. S. 15 How. 433, 448 (14: 761, 767); *Johnson* v. *Towsley*, 80 U. S. 13 Wall. 72, 83 (20: 485, 486); *St. Smelt. & Ref. Co.* v. *Kemp*, 104 U. S. 636, 640 (26: 875, 876); *Shepley* v. *Cowan*, 91 U. S. 330, 340 (23: 424); *Moore* v. *Robins*, 96 U. S. 530, 535 (24: 848, 850); *Quinby* v. *Conlan*, 104 U. S. 420, 426 (26: 800, 802); *Steel* v. *St. Louis, Smelt. Co.*, 106 U. S. 447 (27:226, 227); *Lee* v. *Johnson*, 116 U. S. 51 (29: 570, 571); *Wright* v. *Roseberry*, 121 U. S. 488, 509 (30: 1039, 1045)."

In this case we have the decision that where a power or authority is given by statute to some person or tribunal to do or perform the power or authority thus given without an appeal or supervisory power over him or it, the judgment or action of that person or tribunal is final; and cannot be disturbed except *upon the ground of fraud or for want of authority in the officer* or tribunal. From the approval of an Indian deed or will and testament provided for in these Acts of Congress, there is no appeal or review provided for by an appellate or supervisory tribunal. Hence, the approval of an Indian will by any of the officers or court mentioned in said sections 23 and 8

above referred to, is final and cannot be disturbed collaterally for anything done by them in the exercise of their discretion within this power and authority so conferred by these acts.

The will of Waco Bruner involved in this case was acknowledged before, and approved, by Commissioner Fawcett in due and regular form. No fraud is charged or shown as to that approval or acknowledgment; and the power and authority of such commissioner is undisputed. Hence, all matters involved in such acknowledgment and approval by and before said commissioner are foreclosed by the act of approval, and are not open to dispute or legal controversy according to the decisions and principles above mentioned. Had this will been open to the charge of fraud in such acknowledgment or approval, or for want of power and authority in said commissioner to approve the same, still such matters would not be cognizable in the County Courts of Oklahoma, and such courts would not have jurisdiction therein, as they are courts of limited jurisdiction and derive their powers from the state constitution and the laws of said state, which confines such courts to probate matters, misdemeanors and civil matters involving sums not exceeding one thousand dollars nor less than two hundred dollars, etc. To this it might be said that fraud, u n d u e influence, etc., are made grounds for the impeachment of wills under the stat-

utes of this state, and may be invoked by contesting such will when offered before such courts for probation, as attempted in this case. This is true; but such provisions and the jurisdiction of such courts do not embrace or apply to fraud practiced in procuring the acknowledgment and approval of such full-blood Indian wills over which such County Courts have no jurisdiction except such as has been expressly given them by these Acts of Congress; and the power to impeach such wills for fraud in such approvals, etc., is not given such courts under said acts or any other Act of Congress of which we have any knowledge. Nor is there any express power or authority given said courts for the probation of these full-blood Indian wills made under said Acts of Congress or otherwise. Hence, if such County Courts have such jurisdiction, or such wills require such probation to make them perfect and pass the title to the property devised or bequeathed by such wills after the death of such testator, that jurisdiction and requirement must necessarily arise by implication from the Acts of Congress, for such is not found in their *express* provisions. But, we have seen from the above decisions on the delegation of sovereign powers that such express powers and authority are never enlarged by implication, lost by lapse of time, etc. All matters pertaining to these Indians and their property were expressly reserved to the Government by the express

provisions of section 1 of the Enabling Act, as completely as if said act had never been passed; and the State of Oklahoma is bound by these provisions, *Jefferson* v. *Winkler*, 26 Okla. 653; *Bell* v. *Fitzpatrick*, 157 Pac. ....; *Blue Jacket* v. *Johnson County*, 18 L. ed. 667; *Choate* v. *Trapp*, 56 L. ed. 941; *Heckman* v. *United States*, 56 L. ed. 820. These laws of Congress pertaining to these Indian matters existing prior to the advent of statehood were not repealed by this Enabling Act, *Ex parte Webb*, 56 L. ed. 1248; but Congress retained its full power and authority over them by such act, and has since statehood legislated upon such matters as evidenced by this Act of May 27, 1908, and June 25, 1910, Sec. 32.

In *Jones* v. *Meehan*, 44 L. ed. 49, point 7, this court held:

> " The right of inheritance in land of a member of an Indian tribe whose tribal organization is still recognized by the government is controlled by the laws, usages and customs of the tribe, and not by the laws of the state in which the land is situated, nor by any action of the Secretary of the Interior."

But this principle is subject to the action of Congress; and where Congress enacts a law of descent for such tribes that enactment becomes the supreme law on that subject and displaces the laws, usages and customs of the tribe and prohibits the laws of the

state in which they live. Congress did pass a law of descent for the Creek Nation in section 6 of the Creek Supplemental Agreement, June 30, 1902, and that law remained in full force and effect, at the least, until statehood, *Washington* v. *Miller*, 59 L. ed. 295.

As said section 23 of this Act of 1906 empowers these Indians to make a will and dispose of their restricted property, real and personal, by complying with the provisions thereof—and no provision whatever is made for the probation of such wills in this or any other Act of Congress—then query: Was the probation of such wills either necessary, or intended by Congress, before the same should become effectual as a will or to pass the title to the property therein devised or bequeathed? As was said by this court in *Tiger* v. *Western Investment Co.*, 55 L. ed. 738, and other decisions before that, if such was intended by Congress, it would have been easy to have so provided; and as no such provision was made or provided in said act or otherwise, we must conclude that Congress never intended any such requirements, and that such wills became perfect when executed in the way and manner, in said acts prescribed; and on the death of such Indian testator, such wills became consummate for all purposes and passed the rights and title to the property embraced therein, without any probation thereof whatever. Whether such wills should, or should not, be probated depends upon a

legal construction of these Acts of Congress which are the supreme law on such matters; and a proper construction thereof gives this court jurisdiction of such matters and of this particular case. If no such probation of the will of Waco Bruner was necessary or required under these acts, then it becomes perfectly apparent that the plaintiffs in error were, by the actions, judgments and decisions of these state courts, deprived of their rights, title and interests in the property embraced in said will, contrary to these Acts of Congress; and, that too, by reason of the laws of the State of Oklahoma, thus applied in the case and against them and these federal acts, thus making the laws of the state supreme, and the laws of Congress subordinate thereto, contrary to the express provisions of the Constitution of the United States wherein it is declared in effect that the Constitution, the laws of Congress made in pursuance thereof and treaties, etc., shall be the supreme law of the land, the constitution and laws of the state to the contrary notwithstanding.

Probate Jurisdiction of Our State Courts Over These Indian Matters.

As above stated, in *Jefferson* v. *Winkler* and the other cases above cited, it has in effect been held by our own Supreme Court that whatever jurisdiction the probate courts of this state have in such Indian

affairs, have been derived from these Acts of 1906 and 1908. This is but the conclusion of the law generally on such matters applied to these two specific acts. By section 22 of the Act of 1906, a full-blood heir may convey his interest in inherited lands by having his conveyance thereof approved by the Secretary of the Interior, *Tiger* v. *Western Inv. Co.;* and where there are both adult and minor heirs in the same lands, the interests of the minors may also be sold upon the order of the "proper court" upon the petition of the guardian, as therein provided. By section 2 of the Act of 1908, minor lands may be leased, etc., "by guardian or curator under order of the proper probate court," etc. Whether such provisions are strictly within probate jurisdiction, is immaterial in this case as such are not involved in the case. But section 6 of the Act of 1908 does give a limited jurisdiction of probate matters as to some of these Indians; and stripped of all reference to "local representatives," etc., that section is in substance as follows:

> " That the persons and property of minor allottees of the Five Civilized Tribes shall, except as otherwise specifically provided by law, be subject to the jurisdiction of the probate courts of the State of Oklahoma. * * * *Provided*, That no restricted lands of living minors shall be sold or encumbered, except by leases authorized by law, by order of the court or otherwise."

This is a very limited provision as to such jurisdiction of such probate courts. It is confined, *1st*, to "the persons and property of *minor* allottees" of such tribes—not to the *persons* or *property* of *adult* allottees thereof; *2nd*, "to the jurisdiction of the *probate courts* of the State of Oklahoma"—not to the *probate laws* of Oklahoma; *3rd*, and this is made so subject "*except as otherwise specifically provided by law*"; and *4th*, there is here embraced an absolute prohibition against the *sale* or *encumbrance* of the "*restricted lands of living minors*" "*by order of the court or otherwise*," "*except by leases authorized by law.*"

In *Truskett* v. *Closser*, 198 Fed. 835, the court held that this phrase "except as otherwise specifically provided by law," applied to federal law, and not the laws of the state; and the phrase in the proviso "except by leases authorized by law," doubtless means the same, as it is provided in section 5 of the same act that leases "in violation of law *before* or *after* the the approval of this act shall be absolutely null and void." Section 2 of this act provided how such leases could be made; and section 6 provided that such restricted lands should not be sold or encumbered except by such leases. There are a great many uncertainties about even this section 6 about which a great deal might be said; but we are not here concerned in them in this case. It might be said that all the pro-

bate powers the County Court of Oklahoma have are to be found in this section; but there is no provision there or elsewhere expressly giving such courts jurisdiction, the power, authority or jurisdiction to admit these wills of full-blood Indians to probate, or to require such wills to be probated before such courts or elsewhere. As Congress alone has plenary and exclusive jurisdiction over these Indian matters and that power remains in Congress until by it relinquished by some enactment and bestowed upon state tribunals in the ordinary administration of its affairs or by special provisions which can not be enlarged by implication beyond the express provisions themselves; and as the probation of these full-blood Indian wills is neither expressly required, nor given to these state courts, by any Act of Congress, it would seem that no such necessity exists, and said courts have no such powers or jurisdiction either to probate the same or call in question the validity of such a will executed in the way and manner provided by Congress in these acts. It must, therefore, follow again that these state courts acted without authority or jurisdiction in these matters in attempting to pass upon the validity of this will; and by their judgments and decisions proceeded to hold said will null and void, and thereby to deprive the plaintiffs in error of their legal rights and interests thereunder.

To this it may be suggested that the will was presented to the County Court of said Hughes County for probate by the executor named therein and by so doing he invoked the actions of said court in this case. Even if true, it conferred no jurisdiction in such matters upon said courts, for they could acquire that jurisdiction from Congress only—not from the parties to the proceeding. Besides, it is a time-honored principle that jurisdiction can not be conferred upon a court by consent, agreement or the actions of the parties. This would be true especially in these Indian matters where they were all expressly reserved to Congress in the Enabling Act which precluded the state courts from jurisdiction therein, and the laws of the state from applying thereto, except as therein provided or afterward given. True, the Enabling Act spread the laws of Oklahoma Territory over the state, as far as applicable (Sec. 13), except "as modified or changed by this act" (Sec. 21). But section 1 thereof excluded these Indian matters from the force and effect of this act altogether, and therefore such laws were not "applicable," etc. Hence, neither the substantive nor adjective laws of said Territory applied to these Indian matters; and the courts of this state have no jurisdiction in such matters except what is given them by the Acts of Congress.

Again, the provisions of section 23 of the Act of 1906 are recognized as still in force and effect in sec-

tions 8 and 9 of the Act of 1908, and to some extent are modified thereby. By these provisions, a full-blood Indian of these tribes can go before the court or officers therein mentioned and execute his will disposing of all his restricted property, real and personal, by acknowledging the same before them, and having them approve the same, as therein provided. This is all the provision Congress had made about that; and the power of Congress to make such provision is beyond question. As Congress has thus prescribed this manner and given this power of making such a will, that of itself precludes any other way of making the same or supervision over such matters, *Stephen* v. *Smith*, 19 L. ed. 933. Congress has entrusted the court and officers mentioned in said sections with the sole supervision over the execution of such wills; and it has thereby given them absolute discretion in such cases, without any provision for an appeal therefrom or supervision over the actions of such courts or officers. Hence, under the above-cited decisions, their acts in approving such a will is final and not subject to review by any person or tribunal except for fraud or want of authority. The authority is here expressly given. Such officers are thereby given all the power, authority and jurisdiction which they may see proper to exercise in determining for themselves whether such a will ought, or ought not, to be approved by them. They have the power, and

with it the duty, to ascertain and determine whether any fraud, undue influence or other improper conduct had been practiced either upon, or by, the Indian in the execution of the will. They also have the power, and of course it is the imperative duty, to determine whether the Indian presenting such will for approval is of sound mind and disposing memory. These powers and duties are necessarily implied from the very nature of the trust and confidence imposed by the provisions of the act in such delicate matters. The federal court and those officers were the very persons and tribunal which Congress selected to do these things because of high official positions and character. Such authority is preceded by the prerequisite that such Indian be of "lawful age," and "of *sound mind.*" As such officers had no power to approve the will of a minor or one of unsound mind, this of itself made it imperative that such officers should first ascertain whether such an Indian possessed these qualifications, namely, lawful age and *sound mind.* And where such a will is duly executed and approved by such an officer or court as so required in said acts, there is at least the presumption of law, not only that the Indian was of lawful age and of sound mind, but that such officers or court determined such facts before approving the will, and decided both in favor of the Indian's right to make the same under that law. It is a rule of law that public officers are presumed to

have done their official duty as the law requires; and the burden of proving the contrary is on the accusing party, especially in Indian matters where the rights of the Indian are involved, *Best* v. *Polk*, 21 L. ed. 805. Such court and officers have also the power to determine whether the will as presented is in proper form; for if not in proper form or for any other reasons which they m i g h t deem sufficient cause, they could refuse to approve the same, and the Indian would be helpless in the matter as there is no appeal from such decision provided or provision made to compel the approval—it is purely discretionary with them, but the law would presume such discretion should be reasonable.

Then, query: When such a will is once approved as required by said acts, is not that a final determination within itself by such officer that the testator was then of sound mind and disposing memory? Again, is such an approval, a *judicial*, or simply a *ministerial*, act? The approval of an Indian deed has been held to be simply ministerial, *Bartlett* v. *Okla Oil Co.*, 218 Fed. ..... But the approval of an Indian will is different. The will disposes of all his property or a portion thereof, to take effect at death of the testator, without any pecuniary benefit whatever to himself, and is to operate to defeat his heirs, and to turn the property aside from the course prescribed by the laws of descent, and give the same to the objects of

his bounty. In the probation of a will before a probate court where it enters into an investigation of the condition of testator's mind, the due execution of the will, whether fraud or undue influence was practiced in the procurement of the will, etc., there is no room for doubting that such actions of the court would be *judicial* in its strictest form.

Then, when the federal court or these officers designated in these acts, perform the same duties and determine the same facts, so performed by such probate court in such probation, why would not their acts and judgments also be *judicial;* and no appeal being provided or supervision over the acts given, why would not their acts be as final as those of the probate court? According to the decisions of this court in such matters left discretionary to a person or tribunal, it seems to us the result would be the same in both cases.

Under the decisions of this court in *Wisconsin C. R. Co.* v. *Price County,* 33 L. ed. 687, 694, 695; and *United States* v. *Missouri, K. & T. R. Co.,* 35 L. ed. 766, 771, 772, we conclude that such approvals of such wills are judicial, and not ministerial, in their nature and character. In this first case, this court observed:

> " The approval of the Secretary was essential to the efficacy of the selections, and to give to the Company any title to the lands selected. His action in that matter was not *ministerial* but *ju-*

dicial. He was required to determine, in the first place, whether there were any deficiencies in the lands granted to the Company which were to be supplied from indemnity lands; and, in the second place, whether the particular indemnity lands selected could be properly taken for those deficiencies," etc. (Italics are mine.)

The case is cited with approval in the second case at page 771. Here the Secretary was entrusted by Congress with a supervision of these public lands and to determine what portion thereof should go to this company under the provisions of the act, the same as the federal court and these officers are entrusted with discretionary powers to approve, or not approve, these Indian wills; and there it was held such powers and actions of the Secretary were *judicial*, and not *ministerial*. When performing these duties, this court and officers are discharging federal functions and acting in that capacity, and not as state officers, *Thomas* v. *Loney*, 33 L. ed. 950, and cases cited.

From these premises, decisions and authorities, we submit that when the will of a full-blood Indian, member of these tribes, is d u l y executed and approved by the court or officers designated in said acts, that the same is perfect and all sufficient to pass title to the property embraced therein on the death of the testator; that the same when so approved is not

subject to appeal or supervision by any court, state or federal, either before or after the death of such testator except for fraud, etc., in procuring the approval or want of such officers' power and authority; that such wills do not have to be probated in the courts of Oklahoma; and that such state courts have no jurisdiction whatever over such wills either before or after such death; and that the judgments and decisions of said state courts in this case are null and void, and in violation of said Acts of Congress and the right of Waco Bruner to make said will, the right and authority of said Commissioner Fawcett to approve the same, and the rights, title and interest of the plaintiffs in error arising under said acts.

But whether these premises are correct and sustained by these principles of law and these Acts of Congress are matters to be determined by this court, as they have never been expressly decided by any other court, so far as we know, in direct connection with the matters here presented.

Where a Federal Right Is Involved, the Supreme Court Will Review the Whole Record, Including the Evidence.

—*Kansas City Southern R. R. Co.* v. *Albers Com. Co.*, 56 L. ed. 556, point 2;

Cedar Rapids G. L. Co. v. *City of Cedar Rapids et al.*, 56 L. ed. 594, point 2;

State of Washington etc. v. *Fairchild et al.*, 56 L. ed. 863, point 3;

Creswell v. *Grand Lodge*, 56 L. ed. 1074, point 3;

North Carolina v. *Zachary*, 58 L. ed. 592, point 4;

Southern Pac. R. R. Co. v. *Schuyler*, 57 L. ed. 662, 43 L. R. A. (N. S.) 901;

Interstate Amusement Co. v. *Albert*, 60 L. ed. 439, point 1, and cases cited on page 443.

That all uncertainty as to the validity and effect of said will, arising under the laws of said state, might be avoided and dispensed with, the executor named in said will presented his petition to the County Court of said Hughes County for the probation of the will. To this, the defendants in error filed their written contest, setting up fraud, undue influence, incapacity of Waco Bruner to make the same, etc., as allowed under the probate laws of said state. To this, the plaintiffs in error filed their reply, the fourth paragraph of which is as follows:

> " Said Bilby further charges and avers that the statute of the State of Oklahoma relied upon (by) said contestants, and all statutes and laws therein mentioned, referred to and relied upon by said contestants, to defeat the execution and probation of said will and testament of said decedent are repugnant to, and in open violation of

an Act of Congress entitled 'An Act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes,' and especially section 23 of said act; also another Act of Congress entitled 'An Act for the removal of restrictions from part of the lands of allottees of the Five Civilized Tribes and for other purposes,' and especially section eight thereof; and that the same are also repugnant to and in violation of another Act of Congress entitled 'An Act to ratify and confirm an agreement with the Muskogee or Creek Tribe of Indians, and other purposes;' and especially section seven thereof; and another Act of Congress entitled 'An Act to ratify and confirm a supplemental agreement with the Creek Tribe of Indians, and for other purposes,' and especially section sixteen thereof; each and all of which said Acts of Congress are hereby relied upon by this principal beneficiary under said will, Nicholas V. Bilby, in the establishment and probation of said will; and said Bilby further charges and avers that said statutes of said state and laws thereof so relied upon by said contestants are repugnant to and in violation of the rights, title and interests of said Bilby in and to said lands and estate thus devised to him under said will, and mentioned and described therein; and, therefore, said Bilby presents and insists that said state laws and statutes so relied upon by said contestants are null, void and ineffectual as to said will and the rights, title and interest of said Bilby in and to the lands and other property therein described, under and by

reason of said Acts of Congress and their respective provisions pertaining to the power of such Creek citizens to make wills and dispose of their property; and further charge that said Waco Bruner never had any children and was never married in his lifetime."

The county court, after finding as facts that the will was duly executed, that at the time of its execution, Waco Burner possessed testamentary capacity; and did not execute said will by reason of any undue influence exercised upon him by N. V. Bilby or any other person, but said will was of his own free will and accord, found against the will and these federal acts and matters thus presented by plaintiffs in error and refused to probate the same. On the case being appealed to the District Court of said county, that court submitted the case to a jury to determine whether the will was procured by undue influence, and whether at the time of its execution, Waco Bruner was of sound mind. The jury found both questions against the will. Whereupon plaintiffs in error filed their motion for judgment in their favor notwithstanding the verdict and to set the verdict aside, upon grounds among others, that:

"*Third.* Because said verdict or special findings of facts submitted to the jury are contrary to the facts thus admitted by the contestants and legal consequence thereof; and are like-

wise contrary to the evidence herein adduced; and especially is the finding that said will was procured by undue influence, etc."

The District Court sustained this motion as to such undue influence and set aside that finding of the jury; but overruled it as to the other, and gave judgment refusing the probation of the will. Then, plaintiffs in error moved to set aside this judgment of the District Court, on grounds among others that:

"*Third.* Because the finding of the court that at the time said decedent made said will he was not of sound mind is not sustained by sufficient evidence in the case; but is contrary to the law and the evidence, adduced on the trial of the case.

"*Fourth.* * * * and said judgment of said court finding that at the time said will was thus executed said decedent was not of sound mind is contrary, not only to said admission and its legal effect, but likewise contrary to the law and the evidence taken in the case, as shown by the record herein."

This motion was also overruled by the court to which action the plaintiffs in error excepted (pages 85 and 86 of the record). Then plaintiffs in error appealed to the Supreme Court of said state from said judgment; and among other assignments of error therein are the fourth and fifth, as follows:

" *Fourth.* Because the court erred in holding, finding and adjudging that, at the time of executing said will, the said Waco Bruner did not have a sound and disposing mind, and in sustaining that part or portion of said verdict of said jury wherein it found that at the time said will was so executed said Waco Bruner did not have a sound and disposing mind and capacity to execute it; because such verdict and judgment is contrary to the law and the evidence in this case: and is likewise not sustained 'by a fair preponderance of the evidence,' as was admitted by contestants must exist before they were entitled to a verdict or judgment in the case, as shown by said admission on page 157 of the record.

" *Fifth.* Because said judgment and verdict is contrary to the evidence in this case and the law governing its final determination and probation."

So that in every court and at every stage of the case, and on every occasion, proper or required, these Acts of Congress, the authority thereunder to execute wills, and the federal rights therefrom arising, have been clearly presented and set up by the plaintiffs in error and rigidly insisted upon by them; and it is now maintained by the plaintiffs in error that the finding of the jury and the District and Supreme Courts that, at the time Waco Bruner executed said will, he did not possess testamentary ca-

pacity to make the same, is without support in the evidence, even if said state court had jurisdiction in this matter; and for that reason, the rights of the plaintiffs in error having arisen under said Acts of Congress and the authority thereby given to execute said will, this court has jurisdiction in the premises on this ground also, and under the line of decisions last above cited, it has the right to review and consider all the evidence adduced in the case to determine for itself whether the same will support such finding or judgments. For that reason all the evidence taken in the case has been embraced in the record.

In *Kansas City S. R. R. Co.* v. *Albers Com. Co.*, 56 L. ed. 557, point 2, this court held:

> " The United States Supreme Court may examine the entire record, including the evidence, if properly incorporated therein, to determine whether what purports to be a general finding of facts against one party necessarily involves the decision of question of law bearing upon a federal right claimed by such party in the state court."

In *Cedar Rapids G. L. Co.* v. *Cedar Rapids, etc.*, 56 L. ed. 595, it also held:

> " The evidence in an equity case will be examined by the Supreme Court of the United States in proceedings in error to the state court

insofar as such examination is necessary to answer questions properly saved, coming within the appellate jurisdiction of the Supreme Court of the United States, where the findings to be reviewed depend on questions which are re-examinable in such court."

In *Creswell* v. *Grand Lodge, etc.,* 56 L. ed. 1074, point 3, it again held:

" A question of law arising out of the contention that there was no evidence whatever to support a finding of fact as the result of which a federal right was denied is open to review in the Federal Supreme Court on a writ of error to a state court, if the evidence is in the record."

In *North Carolina* v. *Zachary,* 58 L. ed. 592, point 4, it also held:

" The evidence will be analyzed by the Federal Supreme Court on a writ of error to a state court to the extent necessary to give the plaintiff in error the benefit of its asserted federal right."

In *Interstate Amusement Co.* v. *Albert,* 60 L. ed. 439, point 1, it held:

" The findings of fact are conclusive upon the Federal Supreme Court on writ of error to a state court in ordinary cases other than those arising under the contract clause of the federal constitution, unless there is ground for the in-

sistance that a federal right has been denied as the result of a finding that is without support in the evidence."

Substantially to the same effect are the other decisions of this court above cited and others that could have been cited to show the jurisdiction of this court in this case and its right to review this whole record including the evidence incorporated therein in order to determine whether plaintiffs in error have been improperly and illegally deprived of their federal rights set up and claimed by them under said Acts of Congress. It is their contention that if all the evidence adduced on behalf of the defendants in error to show that Waco Bruner did not have testamentary capacity at the time of said will was admitted to be true, in character and form given in the record, that still the same is not sufficient in law to establish such mental incapacity. In other words, that such evidence does not have that probative force and effect, which is necessary and required to establish mental incapacity to make a will, from a legal standpoint and under the law that governs such matters.

Therefore, whether this evidence does, or does not, show that Waco Bruner was, or was not, of sound mind and had testamentary capacity to make said will at the time he made it, is a proposition of *law,* and not of *fact.* Ordinarily, whether a person

is of sound mind, is a matter of fact. But whether the evidence adduced actually establishes that fact or is competent to do so, presents a proposition of *law* which must be determined by the *courts,* and not a *jury;* for such matter depends not only upon the *competence* of the evidence, but likewise upon what *legal* or *probative* force and effect such evidence may have. If such has no legal weight or probative force, it is practically the same as no evidence at all. It might have some slight weight, but not sufficient to show mental incapacity according to the standard the law fixes in such matters. A man may be weak minded or very erratic, but still have full mental capacity to make his will which could not be broken for those reasons. If the evidence shows simply a weak mind or erratic disposition, that would not be sufficient in law to defeat his will, for the law requires stronger evidence than this before it will destroy a will, etc. On the subject of testamentary capacity, Mr. Bigelow has given a very extensive and exhaustive note in the sixth edition of Jarman on Wills, extending from pages 61 to 66, and which, because of its numerous citation of decisions and condensed form, clearly setting forth the law on that subject, we will give below as follows:

"

Testamentary Capacity.

"*What the term 'testamentary capacity' means.*

"Testamentary capacity is a relative thing and always to be taken in the concrete. The question to be considered is, had the supposed testator capacity to make this supposed will? Hence a man may have capacity to make a will with simple dispositions and not have capacity to make one with complicated dispositions. *Campbell* v. *Campbell,* 130 Ill. 466. Competency is to be judged of by the nature of the act to be done and a consideration of all the circumstances of the cases. *Marsh* v. *Tyrrell,* 2 Hagg. 122. It may not be enough that a man understand questions put to him and answers them rationally. *Id.* That is capacity for that matter, not for something essentially different.

"But even in regard to capacity in this concrete sense, the requirement is only of moderate capacity; the testator may be subject to many infirmities, he may be feeble, absentminded, forgetful, aged, diseased, and blind, and still be equal to what he attempts. *Bannister* v. *Bannister,* 45 N. J. Eq. 702. Extreme weakness, from age or from disease, or other cause, will not as a matter of law create incapacity. *Stoutenburgh* v. *Westbrook,* 43 N. J. Eq. 597; *Lewis' Estate,* 140 Penn. St. 179. It is still a question of fact, upon certain tests to be stated presently, whether there is capacity to make the will in question.

" To take as an instance the case of extreme age, it has everywhere been held that that is no disqualification, for the capacity to make a will calls for soundness of mind, not soundness of body other than the brain. *Kinleside* v. *Harrison*, 2 Phillim. 461; *Griffiths* v. *Robins*, 3 Madd. 192; *Potts* v. *House*, 6 Ga. 324; *Kirkwood* v. *Gordon*, 7 Rich. 474. Still, as Swineburne long ago quaintly said, if a man in his old age becomes a very child again in his understanding or is become so forgetful that he knows not his own name, he is then deemed no more fit to make his testament than a natural fool, or a child, or a lunatic person. Swinb. Pt. 2, Sec. 5, pl. 1; Godoloph. Pt. 1, c. 8, Sec. 4; *Bird* v. *Bird*, 2 Hagg. 142; *Lewis* v. *Pead*, 1 Ves. Jr. 19; Shelf. Lunacy, 276. See *Van Alst* v. *Hunter*, 5 Johns. Ch. 148; *Sloan* v. *Maxwell*, 2 Green, Ch. 581; *Bonner* v. *Matthews*, cited Shelf. Lunacy, 327. In *Lowe* v. *Williamson*, 1 Green. Ch. 82, a will was sustained, although the testator was eighty years of age, very deaf, and his eyesight was defective when he made his will. *In re Reed*, 2 B. Mon. 79, the testator was eighty years of age, and was afflicted with the palsy so that he could neither write nor feed himself, and his will was held valid. See also *Watson* v. *Watson*, 2 B. Mon. 74; *Whitenack* v. *Stryker*, 1 Green. Ch. 8; *Andress* v. *Weller*, 2 Green, Ch. 605; *Stevens* v. *Vancleve*, 4 Wash. C. C. 262; *Bird* v. *Bird*, 2 Hagg. 211; *Nailing* v. *Nailing*, 2 Sneed, 630.

" Indeed, average mental capacity is not required for making a will not involving any special complications; enough that there is capacity

for the object attempted. *Hoban* v. *Piquette*, 52 Mich. 346. Even weakness of mind will not deprive a man of testamentary capacity; as matter of fact and as matter of law, weakness of mind is no more incompatible with testamentary capacity than is bodily infirmity. *Whitney* v. *Twombley*, 136 Mass. 145; *Schneider* v. *Manning*, 121 Ill. 376; *In re Jamison*, 3 Houst. 108; *Duffield* v. *Robeson*, 2 Harr. (Del.) 379; *In re Elliot*, 2 J. J. Marsh. 340; *Delafield* v. *Paris*, 25 N. Y. 9, 27; *Stewart* v. *Lispenard*, 26 Wend. 313; *Clark* v. *Fisher*, 1 Paige, 171; *Dornick* v. *Reichenback*, 10 Serg. & R. 84; *Patterson* v. *Patterson*, 6 Serg. & R. 56; *Tomkins* v. *Tomkins*, 1 Bailey 92. Although of course weakness of mind is more likely to impair the capacity to make a will than is weakness of the body not directly affecting the brain.

" Indeed, weakness of mind may be such as to be insanity and still not take away capacity to make a will. This proposition has been laid down in one form or another in many cases. Thus, it is laid down that a man may be so diseased in mind as not to be of sound mind, and yet possess a disposing mind, that is, capacity sufficient for the purpose to be accomplished. *Campbell* v. *Campbell*, 130 Ill. 466; *Freeman* v. *Early*, 117 Ill. 317 (citing *Meeker* v. *Meeker*, 75 Ill. 260; *Rutherford* v. *Morris*, 77 Ill. 397); *Durham* v. *Smith*, 120 Ind. 463 (citing *Higgins* v. *Carlton*, 28 Md. 115); *Hovey* v. *Chase*, 52 Maine, 304.

" So of weakness of body and mind the result of dissipation, *e. g.*, from excessive use of intoxicating drink; that does not take away capacity. *Ayrey* v. *Hill*, 2 Adams, 206; *Wheeler* v. *Alderson*, 3 Hagg. 602, 608; *Bannister* v. *Jackson*, 45 N. J. Eq. 702 (citing *Peck* v. *Cary*, 27 N. Y. 9, 23); *Elkinton* v. *Brick*, 44 N. J. Eq. 154; *Kahl* v. *Schober*, 35 N. J. Eq. 461; *Andress* v. *Weller*, 2 Green, Ch. 604; *Harmony Lodge's Appeal*, 127 Penn. St. 269. See *Harwood* v. *Baker*, 3 Moore P. C. 282 (where however the will was not allowed, the fact appearing that the maker was feeble and almost unconscious, and that he died five hours afterwards, by reason of a recent accession of disease affecting the brain). Nor will the fact that the supposed testator was at the time suffering from acute pain take away his capacity. *Torrey* v. *Blair*, 75 Maine 548. So also it is declared that partial eclipse of mind will not disable a man from making a will. *McCulloch* v. *Campbell*, 49 Ark. 367; *In re Jamison, supra; Middleditch* v. *Williams*, 45 N. J. Eq. 726. Delusions may exist with testamentary capacity. *Burkhart* v. *Gladish*, 123 Ind. 337; *Durham* v. *Smith*, 120 Ind. 463; *Hite* v. *Sims*, 94 Ind. 333; *Kingsbury* v. *Whitaker*, 32 La. An. 1055; *Brown* v. *Ward*, 53 Md. 376; *Fraser* v. *Jennison*, 42 Mich. 208; *Middleditch* v. *Williams, supra* (citing *Lozear* v. *Shields*, 8 C. E. Green, 509.) To avail against capacity the delusions must touch the will itself. *Cotton* v. *Ulmer*, 45 Ala. 378; *Evans* v. *Arnold*, 52 Ga. 169; *Gardner* v. *Lamback*, 47 Ga. 133; *Lucas* v. *Parsons*, 24 Ga. 640; *Rice* v. *Rice*, 53 Mich. 432 (s. c. 52 Mich. 448);

Fraser v. *Jennison*, 42 Mich. 208; *Benoist* v. *Murrin*, 58 Mo. 307; *Middleditch* v. *Williams*, 45 N. J. Eq. 726; *Stackhouse* v. *Horton*, 15 N. J. Eq. 202; *Denson* v. *Beazley*, 34 Tex. 191. And they must be insane delusions. *Brown* v. *Ward*, *supra*; *Middleditch* v. *Williams*, *supra*, a case in which delusions are considered, the court holding that they must be purely subjective—originating in the mind—to be considered evidence of mental disease, as to which see further, *Hollinger* v. *Syms*, 37 N. J. Eq. 227; *In re White*, 121 N. Y. 406 (citing *Seamen's Soc.* v. *Hopper*, 33 N. Y. 624). Belief in the phenomena of spiritualism is no evidence of incompetency, whether thought to be subjective or objective delusion. *Otto* v. *Doty*, 61 Iowa 23; *Brown* v. *Ward*, 53 Md. 376; *Middleditch* v. *Williams*, *supra* (citing *Robinson* v. *Adams*, 62 Maine, 369); *In re Smith*, 52 Wis. 543. So of other peculiar beliefs, in the absence of delusion. *In re Bonard*, 16 Abb. Pr. N. S. 128; *Denson* v. *Beazley*, 34 Texas 191; *Thompson* v. *Quimby*, 2 Bradf. 449.

" Failure of the memory in the ordinary sense and way, that is, short of breaking down of the faculty in the particular in which its use is now required, will not take away capacity. *Kramer* v. *Weinert*, 81 Ala. 414; *Montague* v. *Allan*, 78 Va. 592; *Nicholas* v. *Kershner*, 20 W. Va. 251. Thus, while a testator must know who are the natural objects of his bounty, he is not wanting in capacity because of failure to recollect names. *Kramer* v. *Weinert*, *supra* (citing *Van Alst* v. *Hunter*, 5 Johns. Ch. 148.)

" But in a case touching memory the law requires a disposing memory, a memory which for the purpose in question is on the whole a sound and safe guide. Defect of memory however is a matter of significance only in regard to what is to be done. A man's memory may be imperfect; it may be greatly impaired by age or disease; it may not be equal to the purpose of recalling the names, the persons, or the families with whom the man may have been intimately acquainted; a man may ask idle questions, or repeat questions which have just been answered; and yet with all this deficiency, that man may be able to make a particular will. *Kinne* v. *Kinne*, 9 Conn. 105; *Comstock* v. *Hadlyme*, 8 Conn. 264; *Rambler* v. *Tryon*, 7 Serg. & R. 95; *Kirkwood* v. *Gordon*, 7 Rich. 474; *Converse* v. *Converse*, 21 Vt. 168. For the particular will may not require the exercise of much memory; it may consist merely in devising a certain piece of land to the testator's wife or son, or in giving his property equally to his wife and only child, or the like. But of course, the fact that the instrument was simple, requiring little or no draft on the faculty or memory, would not save it in a case of insanity in the way of the supposed will.

" It is obvious further that failure of memory affecting the will may not touch testamentary capacity even in the particulars in which the will is affected. A man may have a perfectly sane or disposing memory in contemplation of law, and yet forget a fact, the forgetting of which affects in law his will; in such a case the will is affected, not because of the want of testamen-

tary capacity, but because of the forgetting. The failure of memory, to affect the will on the ground of want of capacity, must be due to mental defect; the faculty itself must be deficient touching the purpose in question, as *e. g.* where prompting is ineffectual.

" It was at once time considered in England that insanity in one particular was sufficient to take away testamentary capacity in general, on the hypothesis that the mind is a unit and what affects a part affects the whole. *Waring* v. *Waring*, 6 Moore, P. C., 341; *Smith* v. *Tebbitt*, L. R., 1 P. & D. 398. But that view has been abandoned, as founded in mistake; and it is now everywhere held that insanity not along the line of the disposition in question will not invalidate the gift. *Banks* v. *Goodfellow*, L. R., 5 Q. B. 549; *Smee* v. *Smee*, L. R., 5 P. D. 84. See *Boughton* v. *Knight*, L. R., 3 P. & P. 64. And see the American cases, *supra*, in regard to delusions. 'Moral insanity' not imparing the intellect, and not accompanied by delusions, is not fatal to testamentary capacity. *Frere* v. *Peacocke*, 1 Robb. Eccl. 442; *Boardman* v. *Woodman*, 47 N. H. 120; *In re Foreman*, 54 Barb. 274. On the whole subject of insanity the reader is referred to chapter 21 of Ewell on Medical Jurisprudence, a work written by one who has had both a legal and a medical education.

" Turning now from what is not incapacity, to what is capacity, it will appear from the authorities, as we have already said, that the test is concrete. In *Whitney* v. *Twombley*, 136 Mass.

145, an instruction in substance as follows was upheld: Soundness of mind such as is required for making a will has relation to the business to be transacted. The mind must be sound with reference to whatever the transaction of the will involves; that is, the testator must be able to understand and carry in mind, in a general way, the nature and situation of his property and his relation to the persons around him, to those who would naturally have some claim to his remembrance, to those in whom, and those things in which, he has been mostly interested. He must be capable of understanding the nature of the act he is doing, and the relation in which he stands to the objects of his bounty, and to those who ought to be in his mind on such an occasion, free from any delusion the effect of disease which might lead him to dispose of his property otherwise than he would if he knew and understood correctly what he was doing.

" Formula to the same effect, or with but slight variation, is put in all the cases. Some of the cases, with the special formula employed, may be given. *Kramer* v. *Weinert*, 81 Ala. 44 (enough if the testator had mind and memory sufficient to call up and remember the property he was about to dispose of, the objects of his bounty, and the dispositions he wished to make; citing *Taylor* v. *Kelly*, 31 Ala. 59; *Lowder* v. *Lowder*, 58 Ind. 538); *O'Donnell* v. *Rodiger*, 76 Ala. 222 (same formula); *Richmond's Appeal*, 59 Conn. 226 (mind and memory enough to know and comprehend the effect to what one is doing, and the nature and condition of one's property,

to understand who are the natural objects of one's bounty and of one's relations to them, the manner in which one wishes to dispose of one's estate, and the scope and bearing of the provisions of the will); *Campbell* v. *Campbell,* 130 Ill. 466 (mind enough to enable one to look about the property to be disposed of, and to know the persons who are to receive benefits); *Schneider* v. *Manning,* 121 Ill. 376 (mind enough to comprehend the dispositions one is making, and to select the objects of one's bounty); *Burkhart* v. *Gladish,* 132 Ind. 337 (mind enough to know the extent and value of one's property, the number and names of the persons who are the natural objects of one's bounty, their deserts as regards the testator, their abilities and their necessities, and to retain all this long enough to have his will prepared and executed—all this necessary, citing *Lowder* v. *Lowder,* 58 Ind. 538); *Durham* v. *Smith,* 120 Ind. 463 (giving the same formula); *Meeker* v. *Meeker,* 74 Iowa 352 (full and intelligent knowledge of the property one has, intelligent perception and understanding of the disposition to be made of it and of the persons to be made the objects of bounty); *Webber* v. *Sullivan,* 58 Iowa 260 (ability to comprehend one's property interests and to determine what disposition to make, and to make them); *Delaney* v. *Salina,* 34 Kan. 532 (soundness sufficient for the particular will; capacity to know what one is doing, the ties of kindred, one's obligations to kindred and friends, and those who are to receive benefits); *Wise* v. *Foote,* 81 Ky. 10 (mind and memory enough to understand that one is selecting the

persons one desires to make beneficiaries, to know one's property and the objects of one's bounty); *Godden* v. *Burke*, 35 La. An. 160 (knowledge of one's property, one's relations to others, and the natural objects of one's bounty); *Myers* v. *Hanger*, 98 Mo. 433 (understanding for ordinary business, for comprehending what dispositions one is making and to whom one is making the same, is enough; citing *Benoist* v. *Murrin*, 58 Mo. 322; *Jackson* v. *Hardin*, 83 Mo. 175); *Waddington* v. *Buzby*, 45 N. J. Eq. 173 (ability to call to mind the property to be disposed of, to understand the manner of distributing it as set forth in the will, to know the objects of bounty and the nature of the business in hand); *O'Brien* v. *Dwyer*, 45 N. J. Eq. 685 (the question is, whether notwithstanding the condition of the body—in a case of one *in extremis*—the testator could comprehend the property he was about to dispose of, the objects of his bounty, the import and meaning of the business in hand, the relation of each of these to the others, and the distribution he had determined to make); *Bannister* v. *Jackson*, 45 N. J. Eq. 702 (same formula, as to a person addicted to drink); *McCoon* v. *Allen*, 45 N. J. Eq. 708 (same formula); *Stoutenburgh* v. *Westbrook*, 43 N.J.Eq. 577 (ability to call to mind near kindred and appreciate their claims, and to comprehend the amount and nature of one's estate and intelligently direct its distribution); *Bost* v. *Bost*, 87 N. C. 477 (capacity to understand the nature of the property, and how and to whom it is to be given); *Kerr* v. *Lunsford*, 31 W. Va. 659 (mind enough to under-

stand the nature of the business in hand, to recollect the property to be disposed of, the objects of one's bounty, and the mode of devision).

" Further, *Purdy* v. *Hall*, 134 Ill. 298.

" There are many ways of stating capacity which are not tests at all; such as broad inclusions, far within which capacity may exist. Thus, it is often stated as perfectly clear that a man who has mind enough to attend to ordinary business has mind enough to make a will. *Schneider* v. *Manning*, 121 Ill. 376; *Bice* v. *Owen*, 120 Ill. 597.

" It is quite as clear that a man have capacity to make his will without having the capacity required for transacting the ordinary business of life. *Kramer* v. *Weinert*, 81 Ala. 414 (citing *Stubbs* v. *Houston*, 33 Ala. 555); *Meeker* v. *Meeker*, 74 Iowa 352. So by the better rule one may make a will who would not be equal to making a contract (involving considerable judgment?) or managing an estate. *Jackson* v. *Hardin*, 83 Mo. 175. In Maryland, however, it is held that one who is not competent to make a deed or contract is not competent to make a will. *Davis* v. *Calvert*, 5 Gill & J. 269, 299, 300. See also *Coleman* v. *Robertson*, 17 Ala. 84; *Minor* v. *Thomas*, 12 B. Mon. 106.

" On the other hand, though a man have capacity to attend to the ordinary affairs of life, yet if he is insane in regard to any of the dispositions attempted, or in regard to the objects of his bounty, he will be wanting in capacity so far. *American Bible Soc.* v. *Price*, 115 Ill. 623.

" There is no distinction in the degree of mental capacity requisite for the execution of a will of real estate, and that requisite for the execution of a will of personal estate. *Sloan* v. *Maxwell*, 2 Green. Ch. 563, 566; *Winchester's Case*, 6 Co. 23. Still in those states where the probate of a will in the probate court is not conclusive of the title to real estate, it is clear law that though the probate of a will of both real and personal estate is conclusive evidence of the sanity of the testator to make such will of personalty, yet it is by no means conclusive evidence of his capacity to dispose of his real estate. This, however, is upon the principle that the capacity of a party to do one act is not conclusive as to his capacity to do another, if his capacity as to the other be triable by a different jurisdiction. Shelf. Lunacy, 66, 67; *Wood* v. *Teage*, 5 Barn. & C. 335.

" *Burden of Proof—Sanity—Presumptions.* The burden of proof of capacity is on him who offers the will for probate; and by the better rule it remains on him so long as the question of capacity remains open, whatever form in the course of the evidence offered it may assume. *Robinson* v. *Adams*, 62 Maine 369; *Crowninshield* v. *Crowninshield*, 2 Gray 524; *Delafield* v. *Paris*, 25 N. Y. 9. See also *Turner* v. *Cook*, 36 Ind. 129; *Kempsey* v. *McGinnis*, 21 Mich. 123; *Aikin* v. *Weckerly*, 19 Mich. 482; *Taff* v. *Hosmer*, 14 Mich. 309; *Beaubien* v. *Cicotte*, 8 Mich. 9; *Boardman* v. *Woodman*, 47 N. H. 120, 132; *Perkins* v. *Perkins*, 39 N. H. 163; *Mayo* v. *Jones*, 78 N. C. 402; *Hawkins* v. *Grimes*, 13 B. Mon. 257,

270; *Thompson* v. *Kyner*, 65 Penn. St. 368; *Williamson* v. *Robinson*, 42 Vt. 558. But see *Higgins* v. *Carlton*, 28 Md. 115.

" To sustain the burden, in a case not contested on that point, but slight evidence, in any state, is required. *Allen* v. *Griffin*, 69 Wis. 529. See *In re Silverthorn*, 68 Wis. 372. Producing for probate an instrument purporting to be a will, with proof of its execution and attestation according to law, the instrument disclosing on its face nothing to cast doubt upon it, will by the better view raise a presumption in favor of the capacity of the supposed testator. *McCulloch* v. *Campbell*, 49 Ark. 367; *Duffield* v. *Morris*, 2 Harr. (Del.) 375; *Fee* v. *Taylor*, 83 Ky. 259; *Higgins* v. *Carlton*, 28 Md. 115, 141; *Barrett* v. *Brooks*, 7 Pick. 94, 98; *Spratt* v. *Spratt*, 76 Mich. 384; *Aikin* v. *Weckerly*, 19 Mich. 482; *Turner* v. *Cheesman*, 2 McCart 243; *Barker* v. *Barker*, 63 N. Y. 409, 414; *Perkins* v. *Perkins*, 39 N. H. 163; *Mayo* v. *Jones*, 78 N. C. 402; *Brown* v. *Molliston*, 3 Whart. 129. That is, a presumption of capacity in the proper sense arises, to-wit, without any direct evidence as to capacity.

" But this doctrine of presumptive capacity is not admitted by some courts. *Cilley* v. *Cilley*, 34 Maine 162; *Gerrish* v. *Nason*, 22 Maine 438; *Williams* v. *Robinson*, 42 Vt. 658. And indeed, while it is true that a man's sanity and competency to enter into ordinary undertakings, such as contracts, and to transact business in general, will be presumed, there is some ground for doubting whether a full presumption in favor of

competency should be allowed, as matter of policy, in the execution of an instrument of such momentous importance ordinarily as a will, made as a will is apt to be, in time of weakness of body, and more or less of mind also. And for this reason the practice is probably very general of inquiring of the attesting witness in regard to the testator's mental condition. Indeed, it is not improper to do so even when affirming a presumption of sanity, as in *Aikin* v. *Weckerly*, 19 Mich. 482, 502; for the presumption may be a very slender one, as where the will was executed *in extremis*, and at best it may properly be fortified because of its special nature and importance. Speaking then for the better if not the universal rule, if the attesting witnesses or any of them are before the court they will be questioned on the subject; but after they have given their testimony, assuming that it is in favor of the will, the burden of proof is fully sustained, unless evidence is brought forward on the other side.

" The dispositions themselves of the will, the general tenor and coherency (or incoherency) of the language, being reflections of the mind of the testator, especially in the case of a holograph, may be considered on the question of capacity. *Whitman* v. *Morey*, 63 N. H. 448; *Anderson* v. *Irwin*, 101 Ill. 411. And this even for the purpose of setting up a will lost or destroyed. *Anderson* v. *Irwin*. The fact, too, that the dispositions of the will, in a case of doubt raised in regard to capacity, are in accord with the tes-

tator's ties of kindred and are apparently just, may be taken in favor of his capacity.

" If evidence of want of capacity is produced, the question will become one of the weight of the evidence. *Pendley* v. *Eaton*, 130 Ill. 69 (citing *Carpenter* v. *Calvert*, 83 Ill. 63; *Holloway* v. *Galloway*, 51 Ill. 160); *Wilbur* v. *Wilbur*, 129 Ill. 392; *Hawkins* v. *Grimes*, 13 B. Mon. 257; *Aikin* v. *Weckerly*, 19 Mich. 482; *Kempsey* v. *McGinnis*, 21 Mich. 123. And, the burden of proof being upon the proponent, the evidence of capacity should outweigh the evidence on the other side. *Aikin* v. *Weckerly* and *Hawkins* v. *Grimes*, *supra*.

" The testator's state of mind before or after the execution of the will may be shown touching the question of his capacity at the time of executing it. *Moore* v. *Spier*, 80 Ala. 129; *Dyer* v. *Dyer*, 87 Ind. 13 (day before); *Staser* v. *Hogan*, 120 Ind. 207 (before). Thus, if it appears that before or soon after the will was executed the supposed testator was insane, the insanity not having been caused by acute disease or acute pain, the presumption arises that he was insane when he executed the will, and it will now be necessary for the proponent to show that the testator was of sound mind when the instrument was executed, or that it was executed during a lucid interval. *O'Donnell* v. *Rodiger*, 76 Ala. 222 (citing *Saxon* v. *Whitaker*, 30 Ala. 237; *Grubbs* v. *McDonald*, 91 Penn. St. 236); *In re Toomes*, 54 Cal. 509 (insanity before or after, citing *Kinne* v. *Kinne*, 9 Conn. 104; *Peaslee* v. *Robbins*, 3 Met. 164; *McAllister* v. *State*, 17 Ala.

436); *Dyer* v. *Dyer*, 87 Ind. 13; *Rush* v. *Megee*, 36 Ind. 69; *Chandler* v. *Barritt*, 21 La. An. 58; *Halley* v. *Webster*, 21 Maine 461; *Goble* v. *Grant*, 2 Green. Ch. 629; *Whitenack* v. *Stryker*, 1 Green. Ch. 8; *Clark* v. *Fisher*, 1 Paige 171, 174; *Jackson* v. *Van Dusen*, 5 Johns. 144, 159; *Harden* v. *Hays*, 9 Barr. 151; *Boyd* v. *Eby*, 8 Watts 66; *Cartwright* v. *Cartwright*, 1 Phillim. 100. But as to insanity long after the will was made, see *Taylor* v. *Creswell*, 45 Md. 422. Aberration of mind caused by acute disease or pain will not be presumed to continue for any particular length of time. Its continuance, when otherwise a case of capacity has been made, is to be shown by evidence. *O'Donnell* v. *Rodiger*, *supra* (citing *Brown* v. *Riggin*, 94 Ill. 560; *Hix* v. *Whittemore*, 4 Met. 545; *Staples* v. *Wellington*, 58 Maine 453); *Blake* v. *Rourke*, 74 Iowa, 509; *Townshend* v. *Townshend*, 7 Gall. 10; *Little* v. *Little*, 13 Gray, 264, 266; *McMasters* v. *Blair*, 29 Penn. St. 298.

"With regard to the not uncommon statement that, when a presumption is raised on one side the burden of proof falls upon the other, it may be remarked that that does not necessarily mean anything more than that such other side must now bring forward evidence against the presumption. The burden of proof, in the proper sense, may not be changed at all. See *Aikin* v. *Weckerly*, 19 Mich. 482, 502; *Kempsey* v. *McGinnis*, 21 Mich. 123. Sometimes the presumption may be of a kind to require very strong and satisfactory evidence to affect it; that is, it will prevail unless actually upset by preponderat-

ing evidence. But the raising of a presumption touching capacity is usually a presumption against capacity; and the only effect of course is to make the burden of proof of capacity the more difficult to support. This appears to be the case with regard to lucid intervals; the evidence of capacity in such supposed intervals must be very clear. *White* v. *Driver*, 1 Phillim. 88; *Brodgen* v. *Brown*, 2 Adams, 445; *Avery* v. *Hill*, *id.* 210. So again, an inquest finding the supposed testator to be of unsound mind, and putting him under guardianship, can be overturned only by clear, explicit, and satisfactory evidence that the testator had sufficient capacity, freedom of will, to make the will in question. *Stevens* v. *Stevens*, 127 Ind. 560. *Contra*, *Rice* v. *Rice*, 50 Mich. 448 (s. c. 53 Mich. 432). But the inquest is not conclusive. *Stevens* v. *Stevens* (citing *Stone* v. *Damon*, 12 Mass. 504; *Breed* v. *Pratt*, 18 Pick. 115). So of guardianship, *Garnett* v. *Garnett*, 114 Mass. 379; *Little* v. *Little*, 13 Gray 264; *Crowninshield* v. *Crowninshield*, 2 Gray 524. But in principle there has been no shifting of the burden of proof in any such case; and the same thing must be said of a case in which the presumption raised is in favor of capacity; if the evidence on the other side leaves the question in suspense, the burden of proof of capacity is not sustained. The evidence on the side of capacity should outweigh that on the other side in all cases. This is well brought out in *Aikin* v. *Weckerly*, 19 Mich. 482, 502. See also *Hawkins* v. *Grimes*, 13 B. Mon. 257, 270.

" Evidence. It is well settled that the testator's declarations before or after making the will, but near that time, are evidence of the state of his mind when he made it. *Canada's Appeal,* 47 Conn. 450; *Conway* v. *Vizzard,* 122 Ind. 266 (citing *Lamb* v. *Lamb,* 105 Ind. 456; *Bundy* v. *McKnight,* 48 Ind. 502); *Potter* v. *Baldwin,* 133 Mass. 427; *May* v. *Bradlee,* 127 Mass. 414; *Shailer* v. *Bumstead,* 99 Mass. 112; *Bush* v. *Bush,* 87 Mo. 480 (citing *Gibson* v. *Gibson,* 24 Mo. 227; *Tingley* v. *Cowgill,* 48 Mo. 201); *Middleditch* v. *Williams,* 45 N. J. Eq. 726 (citing *Rusling* v. *Rusling,* 36 N. J. Eq. 603, 607); *Marx* v. *McGlynn,* 88 N. Y. 357; *Herster* v. *Herster,* 122 Penn. St. 239; *McMechen* v. *McMechen,* 17 W. Va. 683. This, by the better rule is as far as the evidence can go. To receive them as evidence of the facts stated in them would be either to make or unmake, in whole or in part, a will by parol, contrary to the statute, or it would be to let in hearsay. *Gibson* v. *Gibson,* 24 Mo. 227; *Rusling* v. *Rusling,* 36 N. J. Eq. 603. Hearsay it would be in any case. Comp. declarations as to undue influence, *infra,* p. 71 (top paging).

" Foolish reasons given for the dispositions of the will are not evidence, standing alone, of insanity. *Stoelker* v. *Thornton,* 88 Ala. 241. See *Thompson* v. *Thompson,* 21 Barb. 107, of foolish and absurd ideas. And the same is true of caprice, and of unfounded prejudice against any of the testator's family, and unjust discrimination in consequence, if not the result of delusion. *Snider* v. *Burke,* 84 Ala. 53; *Schneider* v. *Manning,* 121 Ill. 376; *Smith* v. *James,* 72 Iowa 515;

Webber v. *Sullivan*, 58 Iowa, 260; *Trumbull* v. *Gibbons*, 2 Zabr. 117; *In re Mondorf*, 110 N. Y. 450; *Foster's Estate*, 142 Penn. St. 62; *Coffman* v. *Hedrick*, 33 W. Va. 119; *Kerr* v. *Lunsford*, 31 W. Va. 659; *Nicholas* v. *Kershner*, 20 W. Va. 251. Such things may however be considered in the question of capacity, in connection with other facts having a tendency to show incapacity. *Staser* v. *Hogan*, 120 Ind. 207; *Schneider* v. *Manning*, *supra* (citing *Lamb* v. *Lamb*, 105 Ind. 457; *Denison's Appeal*, 39 Conn. 405; *Bilner* v. *Bilner*, 65 Penn. St. 362; *Kevill* v. *Kevill*, 2 Bush 614; *Kimball* v. *Cuddy*, 117 Ill. 217); *Salisbury* v. *Aldrich*, 118 Ill. 199; *Conway* v. *Vizzard*, 122 Ind. 266; *In re Nelson*, 39 Minn. 204; *Chaney* v. *Bryan*, 16 Lea 63. So too it is laid down that prejudice, ill-will, hatred, or the exhibition of violent temper by a person ordinarily amiable may be shown on the question of capacity, if accompanied with other facts tending to show insanity. *Sherley* v. *Sherley*, 81 Ky. 240; *Chaney* v. *Bryan*, *supra*. See *Staser* v. *Hogan*, 120 Ind. 207. Suicide is no evidence of insanity. *Sherley* v. *Sherley*, 81 Ky. 240; *Chaney* v. *Bryan*, *supra*. See *Staser* v. *Hogan*, 120 Ind. 207. Suicide is no evidence of insanity. *Eluce* v. *Ferguson*, 43 Md. 479; *Brooks* v. *Barrett*, 7 Pick 94; *Duffield* v. *Roberson*, 2 Harr. (Del.) 375; *Burrows* v. *Burrows*, 1 Hagg. 109.

" It is well settled that attesting witnesses, though not experts, may give their opinions, formed at the time of executing the will, of the testator's sanity, without detailing the facts on which the opinion is based. *Parson* v. *Parson*,

66 Iowa 754; *Melanefy* v. *Morrison*, 152 Mass. 473 (witness to codicil); *Williams* v. *Spencer*, 150 Mass. 346; *May* v. *Bradlee*, 127 Mass. 414; *Robinson* v. *Adams*, 62 Maine 369, 409; *Clapp* v. *Fullerton*, 34 N. Y. 190. See however *Yardley* v. *Cuthbertson*, 108 Penn. St. 395; *Brown* v. *Mitchell*, 75 Texas 9. But it is said that such evidence is to be received with suspicion. *Webb* v. *Dye*, 18 W. Va. 376 (citing *Young* v. *Barner*, 27 Gratt. 103; *Lambert* v. *Cooper*, 29 Gratt. 61; *Chatham* v. *Hatcher*, 30 Gratt. 56). In Ohio the witness may state his opinion though it was formed after the execution of the will. *Runyan* v. *Price*, 15 Ohio St. 1.

" Non-attesting witnesses, after detailing the facts, may give their opinions; but they should first show that their acquaintance with the testator has been such as to enable them to form a correct opinion on the subject. *Moore* v. *Spier*, 80 Ala. 129 (citing *Ford* v. *State*, 71 Ala. 385); *In re Carpenter*, 79 Cal. 382 (citing *People* v. *Pico*, 62 Cal. 53; *People* v. *Levy*, 71 Cal. 623; *People* v. *Fine*, 77 Cal. 147; *In re Toomes*, 54 Cal. 509); *American Bible Soc.* v. *Price*, 115 Ill. 623; *Burkhart* v. *Gladish*, 123 Ind. 337; *Staser* v. *Hogan*, 120 Ind. 207; *Ryman* v. *Crawford*, 86 Ind. 262; *In re Norman*, 72 Iowa 84; *Parson* v. *Parson*, 66 Iowa 754; *Rice* v. *Rice*, 50 Mich. 448; s. c. 53 Mich. 432; *In re Pinney*, 27 Minn. 280; *Appleby* v. *Brock*, 76 Mo. 314; *In re Coleman*, 111 N. Y. 220; *Runyan* v. *Price*, 15 Ohio St. 1; *Shaver* v. *McCarthy*, 110 Penn. St. 339; *Brown* v. *Mitchell*, 75 Texas 9; *Cockrill* v. *Cox*, 65 Texas 669; *In re Blood*, 62 Vt. 359. But in some courts

non-attesting witnesses, if not experts, are not permitted to give an opinion on the testator's mental condition, whatever may have been their opportunities of observing the same. They must confine themselves to the facts. *Williams* v. *Spencer*, 150 Mass. 346; *Ellis* v. *Ellis*, 133 Mass. 469; *May* v. *Bradlee*, 127 Mass. 414 (citing *Hastings* v. *Rider*, 99 Mass. 622, 625; *Barker* v. *Comis*, 110 Mass. 477, 487; *Nash* v. *Hunt*, 116 Mass. 237, 251); *Bridgman, Appellant*, 82 Maine 323. See also *Fayette* v. *Chesterville*, 77 Maine 28. In Massachusetts accordingly only the attesting witnesses, the family physician, having been physician to the deceased, and other skilled witnesses as experts, can give their opinions. *May* v. *Bradlee, supra.* As to skilled witnesses, see *Schneider* v. *Manning*, 121 Ill. 376; *Yardley* v. *Cuthbertson*, 108 Pa. St. 395); *Morris* v. *Morris*, 119 Ind. 341 (waiving privilege by physician); *In re Coleman*, 111 N. Y. 220 (waiving privilege); *Montague* v. *Allen*, 78 Va. 592; *Nicholas* v. *Kershner*, 20 W. Va. 251; *Jarrett* v. *Jarrett*, 11 W. Va. 584.

" Further in regard to evidence on the question of capacity, see *Mill's Appeal*, 44 Conn. 484 (delusion in regard to beneficiary); *Ross* v. *McQuinton*, 45 Iowa 145 (personal history of testator mentally and physically); *Cleveland* v. *Lyne*, 5 Bush 383 (delusion in regard to beneficiary); *Woodward* v. *Sullivan*, 152 Mass. 470. *Baxter* v. *Abbott*, 7 Gray 71 (insanity of testator's parents and of an uncle); *Edge* v. *Edge*, 38 N. J. Eq. 211; *Barker* v. *Barker*, 36 N. J. Eq. 259; *In re Lewis*, 33 N. J. Eq. 219 (devoting

one's money to paying off war debt no evidence of incapacity); *Clapp* v. *Fullerton*, 34 N. Y. 190 (delusion in regard to testator's daughter); *Seamen's Soc.* v. *Hopper*, 33 N. Y. 619; *McDonald's Estate*, 130 Penn. St. 480; *Ballentine* v. *Proudfoot*, 62 Wis. 216."

To the same effect and on the same subject, we will also give an extensive excerpt from Underhill on Wills, as follows:

"*Sec. 86.* It is a presumption of law that all men are of sound mind and able to attend to their ordinary affairs. Sanity of mind is the normal condition of most human beings, and he who would prove the contrary in any particular case must produce evidence of his allegations. So, applying this principle to the probate of wills, it is the general rule, which is sustained by the majority of the cases, that all persons of the statutory age are presumed to have testamentary capacity; and it follows from this, that the party who contests the probate of a will upon the grounds of a lack of such capacity has the burden of proof to show incapacity by evidence upon that point, except in the single case where the testator is shown to have suffered from fixed insanity, not mere delirium, prior to the execution of the will.

"At this point it may be of advantage to distinguish between burden of proof, *i. e.*, the obligation to make out a *prima facie* case at the probate, and the question which side must produce

a preponderance of evidence upon the question of the testamentary incapacity of the testator.

" It is often said that the burden of proof to show the due execution of the will and capacity is upon the proponent. By this no more is meant than that he must make out a *prima facie* case by the subscribing witnesses. He is required in the first instance to prove the due execution of the will according to the statutory formalities. Proof by the subscribing witnesses that the testator requested them to attend the execution of his will; signed it in their presence; stated it to be his will, and performed the other necessary acts of execution, and that he did this in a rational and intelligent manner, may in itself justify a presumption that he possessed testamentary capacity at the time. And the mere fact that those who are subscribing witnesses did in fact attest the will is some evidence that the testator was sane at the time, for no honest and fair man would attest the execution of a will, knowing that the testator was insane. During the taking of testimony of the subscribing witnesses, it is customary and highly proper, whether their testimony be taken by affidavit or deposition by the clerk, where the probate is uncontested, or *viva voce* in open court, where it is contested, to inquire of them if, in their opinion formed at the time of execution, the testator had capacity to execute his will; and if they answer that he had, their opinion thus given is of great weight, for they have been placed near the testator by the law, not only to guard him from fraud, but to ascertain whether he has capacity.

> Hence their testimony of the points above mentioned will be sufficient alone to sustain the burden of proof which is on the proponent; and the presumption of law that every man is sane casts upon the contestant the necessity of overcoming, by the preponderance of evidence, the *prima facie* case thus made out. He must then offer affirmative evidence of testamentary incapacity, and the proponent on his part may corroborate the evidence of the subscribing witnesses by the testimony of other witnesses. The general presumption of sanity existing in the proponent's favor will control, unless upon all the evidence the proof of incapacity preponderates."

Here, in support of this text, this eminent author devotes two-thirds of the last page in the citation of numerous decisions from the Supreme Courts of the States of Alabama, Arkansas, California, Connecticut, Delaware, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Missouri, New Jersey, New Hampshire, New York, Ohio, Oregon, Massachusetts, Pennsylvania, Tennessee and Vermont; and to which the attention of the court is here invited. It would seem that this text and the legal principles therein enunciated have special importance in the case at bar; for here the subscribing witnesses to the will in controversy were men of superior intelligence and unquestionable integrity. The will was drafted by Mr. Moffet, an attorney, who, before he would draw

the will at all, closely examined the testator not only as to his sanity and intelligence, but likewise as to the way and manner in which he desired to make that will, what property he had to thus dispose of, and to whom he desired to devise the same and his reasons for so doing; and after fully satisfying himself on all these matters, prepared that will at practically the dictation of the testator and under his immediate direction and supervision. Then, Mr. Long, another attorney, is asked to witness the will. He hesitates to do so because averse to attesting wills, but is informed by the testator that if he does not want to witness his will, he will get someone else. He then takes the testator and the will into a private room. There he examines and reads the will, and questions the testator about his will, and tells him he does not have to make a will; but he is informed that he wanted to make the same and that he had no near relatives and wanted Mr. Bilby to have his property, etc., and the reasons why he wanted him to have the same, and for that reason he was making the will. Then, Mr. Fawcett who is entrusted by the Federal Government to supervise the execution of full-blood Indian wills, as provided in its statutes, is called in to approve this will as provided in such statutes, and he is again informed by the testator of his aims and purposes in so making this will, as described in his testimony taken in this case. Mr. Dutton, the druggist, is also

told by the testator that this is his will and requested him to witness it. There, according to the testimony of all these witnesses, they were alone with this testator, with no one to in any way influence him to do what he was then doing; and with Mr. Long trying to dissuade him from making the will and objecting to witnessing the same; still the testator insisted on making the will and that they should witness it for him; and all the while presenting these matters in such a rational and intelligent manner as to impress upon the minds of such men as these that he was then sane, of sound mind, and had testamentary capacity; and they so testify in this case. This author says that the testimony of the subscribing witnesses has great weight in determining the mental capacity of the testator at the time of making the will; and I submit that it so happened in the case at bar, that the subscribing witnesses, and those present at the execution of the will, are men of such superior intelligence, and so highly capable of judging of the mental capacity of this testator, that their testimony in this case should be given far more weight than ordinarily would be given to ordinary subscribing witnesses. There is every reason why this should be done; for three of these persons were members of the bar, duly admitted to practice before the courts, and, therefore, officers of the court; and one of them charged with the special duty of guarding against improper

wills, by the federal government. Such testimony is not to be lightly disregarded; nor can the same be readily swept away by designing relatives testifying that such testator was not of sound mind, simply because he had no home, or wife, and did not try to marry, such as characterizes the flimsy testimony of the contestants in this case. In these "piping days" of mercenary marriages and divorces, and especially where the man had one hundred and sixty acres of land, it might be maintained with a great deal of force and consistency that "single blessedness" is conclusive of the highest order of guarded foresight and intelligence. But, be that as it may, we are confident that such frivolous matters will not impress themselves very seriously on this court.

The author (Mr. Underhill) goes further and observes:

> " *Sec. 87.* The statutes regulating the execution of wills invariably provide that the testator must be of a 'sound and disposing mind.' It therefore becomes necessary to determine what constitutes, in law, a sound and disposing mind as regards the execution of a will. In other words, what is the measure of mental capacity which one must possess before he can validly dispose of his property by a last will and testament? The deceased, it is needless to say, need not have a *perfect* mind. His mental powers may have been weakened by disease or diminished by old age; he may not have capacity to

make a contract or to attend to the ordinary affairs of life, and yet have testamentary power. The rule is that if, from all the facts and circumstances considered together, it satisfactorily appears that the testator, *when making his will*, understood fully and intelligently the nature of the business in which he was engaged, comprehended generally the nature and extent of the property which constitutes his estate and which he intends to dispose of, and recollects the objects of his bounty, he has sufficient capacity to make a will.

" He must recall to mind and retain in his recollection the objects of his bounty and the particulars of the property he intends to give them. And he must have intellect sufficient to grasp the general theory of the instrument he is about to execute, and to form a rational judgment of the transaction in which he is about to engage.

" It is essential that the testator shall have sufficient capacity to comprehend perfectly the condition of his property, his relations to the persons who were, or should, or might have been the objects of his bounty, and the scope or bearing of his will. He must have sufficient active memory to collect in his mind, without prompting, the particulars or elements of the business to be transacted, and to hold them in his mind a sufficient length of time to perceive their obvious relations to each other, and to be able to form some rational judgment concerning them.

" It is not necessary to show that he understood, as an experienced lawyer would under-

stand, the meaning and probable effect of any or all of the provisions of his will. Nor is the artificial and complicated character of the will itself of much importance in determining whether the testator, being an unlearned man, had capacity to make it, where it appears that he employed professional assistance in preparing it. But the character of the will must be viewed in connection and situation of the testator, and is entitled to much consideration. The fact that it is a r e a s o n a b l e will, reasonably framed in intelligent language, and that the deceased has given due regard to the c l a i m s of kindred, ought to have much weight in determining his capacity. The situation of the testator, the amount and character of his property, and his previous habits of managing his own affairs, are to receive due consideration. The question is not so much the abstract one, *Had the testator capacity to make the will?* but had he, in view of all the circumstances as they are proved, the capacity to make *the* will which it is alleged he did make? For the only period during which he must have possessed testamentary capacity is that particular portion of time during which he is executing the will. The true enquiry is to ascertain the condition of the mind of the testator at the precise time of the execution of the instrument purporting to be his will. His testamentary capacity at other times is not material, except so far as his mental condition then may enable the court to determine his mental condition at the moment of the execution of the will."

" *Sec. 88.* Evidence that the testator, both before and after the execution of the will, was interested in, and able to attend to, his ordinary business, and that he conducted it properly, may be given to show his mental condition at the date of execution; for the fact that a man has sufficient capacity to attend to his business affairs, to buy and sell property, to collect money due him, and to borrow or loan money, may be evidence that he has capacity to make a will. Hence, it is relevant to show that the testator had made out and signed checks in a firm hand: that he sold his business for a good price; that he had sold his lands, rented his houses, and settled his father's estate of which he had been appointed executor; that during the time that it is alleged he was unfit to execute a will the contestants had sought his advice in matters of business and had acted upon it as reliable; and generally that he had managed his property with such ability that his estate had been materially increased.

" It is perhaps needless to say that the mere fact that the testator had delegated the active control of his business to others, while retaining the ownership and actual management of it, is not material. For though an aged testator, because of illness or physical weakness, refrains from giving active attention to the details of his business, and delegates that to others who are completely under his direction and control, he manages his business himself as actually as though he, in fact, personally attended to each

detail. And he may also, because of his necessary isolation from active life, require the advice of others, and may act upon such advice in connection with his business.

" Nor is it necessary to show that the testator had the actual mental capacity to engage in, and that he did in fact undertake, very extensive business transactions. Neither is it required to show that he conducted his ordinary business affairs with the same amount of vigor and attention, and with the same degree of success, as formerly; for, while a diminution of mental power may be indicated by his inattention, or his want of success, yet neither of these facts, nor both, is conclusive. If he shall retain sufficient mental capacity to attend personally, or through others, to his ordinary business affairs, and to carry them on with a fair degree of success, he has testamentary capacity. His will ought to be admitted to probate unless it shall appear that, at the time of its execution, he was laboring under an insane delusion which influenced its provisions."

" *Sec. 89.* While it is the rule that a man who has the capacity to carry on his ordinary business has capacity to make a will, it does not follow that *one who is unable to conduct his ordinary affairs* is lacking also in testamentary capacity. The deceased may have lost his interest in or his ability to carry on the business or profession which he has followed during his life, may no longer be able to attend to the details of its practice, and may yet possess the

capacity to execute a valid will disposing of his estate. The character of the business in which the deceased had been engaged and the nature and extent of the property disposed of by the will ought to be considered together. Thus, the fact that a will prepared by the testator himself is verbose and complicated might arouse suspicion of his capacity if the testator was an illiterate man, unused to legal phraseology, though it would appear perfectly natural if he were a lawyer of long and extensive practice. And though the character of the vocation in which the deceased had been engaged was extremely simple, the fact that he is no longer able to carry it on is not conclusive that he cannot make a will. For it is a well settled rule, sustained by numerous cases, that it does not require the same degree of mental capacity to make a will as it does to make a contract. In other words, a man may make a will who no longer has the mental ability to make a contract."

In section 74 of volume 14 of R. C. L., it is observed:

" In all civil actions it is generally held that the burden of proof of insanity rests upon him who alleges insanity, or seeks to avoid an act on account of it, and it devolves upon him to establish the fact of insanity by a preponderance of the evidence."

The correctness of this statement of the author is admitted by counsel for defendants in error at

the close of the testimony in this case, as may be seen on page 85 of the record, where it is also shown that such counsel "*stated in open court that contestants admitted that the proponents had made out a prima facie case.*"

Section 76 of this same volume is as follows:

" A conflict of authority exists in relation to the burden of proof of sanity or insanity in relation to wills. According to the rule in many jurisdictions, the burden of proof rests upon the contestants of the will to prove the testamentary incapacity of the testator. This view is supported by the argument that, as in other cases, sanity is presumed until the contrary is shown. (Citing a number of decisions.) Some courts, however, adopt the rule that the burden of proof of sanity on the part of the testator rests with the proponents of the will, on the theory that they must show all facts necessary for making of a valid will, including the fact that the will was the act of a man mentally capable of making the same. The rule has been laid down by some authorities that while affirmative proof of a testator's capacity is required *when a prima facie case has been made out*, the presumption of sanity arises, and the burden is shifted to the contestants, and that, while the person propounding a will must prove not only its execution and publication but also the mental capacity of the testator, one who sets up the fact that a testator is insane must prove it. So also, though the rule is recognized that the bur-

den is on the contestants to prove insanity, it is well settled that if it is shown that insanity existed before making of the will, it is then incumbent on those claiming under the will to prove sanity at the time the will was executed. But the burden of proving insanity is not sustained when all that is shown is that the testator had occasional or intermittent attacks of insanity." (The parentheses and italics are mine.)

Meaning of Sound Mind and Memory.

Section 83 of the very recent work of Thompson on Wills, is as follows:

" By the statement that the testator has 'a sound mind and memory' is meant that he is able to execute his will with an understanding of the nature of the act, such as the recollection of the property he means to dispose of; of the persons who are or who might reasonably be the objects of his bounty, and the manner in which it is to be distributed among them. It is sufficient if he understands what he is about, even if he has less mental capacity than would be required to make a contract. But it is evident that it takes more mental capacity to make some wills than it does to make some contracts, and *vice versa;* and there is excellent authority for the rule that, while contractual capacity implies *prima facie* the capacity to make a will, yet neither is a test for the other, and the presence or absence of one does not conclusively establish the presence or absence of the other.

" The existence in the mind of the testator of minor details which do not affect either the natural or selected objects of his bounty is not inconsistent with testamentary capacity. All cases of bodily disease in some degree affect the mind and thus render it, technically speaking, unsound, but it does not follow that the patient is therefore incapacitated from transacting ordinary business.

" A monomaniac, or person partially insane, although sensible and prudent on subjects and occasions other than those upon which his infirmity is commonly displayed, is not capable of making a will, if his monomania relates to the object or objects of his bounty.

" Eccentricities of conduct, absurd notions, and belief in things which to other persons may seem absurd, do not necessarily establish testamentary incapacity. The proposition is well settled that an idiot is incapable of making a valid will. But persons possessing a low grade of intellect, yet having capacity to know and understand the nature and extent of his property, the proper objects of his bounty and the nature of the testamentary act, have been held capable of making a valid will. The same rules governing the testamentary capacity of idiots apply to imbeciles." (Citing numerous decisions to support this text.)

In *Leach* v. *Burr*, 47 L. ed. 567, this court held:

" The burden of proof on the issue of the mental soundness of a testator is, in the District of Columbia, upon the caveators."

And in that case reviewed the evidence in the case which involved the probation of a will.

In 11 Ency. of U. S. Reports, page 1023, it is said:

> " A person may be insane to the extent of being dangerous if set at liberty, and yet may have sufficient mental capacity to make a will." (Citing as authority the decision of this court in *Keely* v. *Moore*, 49 L. ed. 376.)

In this last case the testator had been adjudged insane and confined in the asylum from which he had been discharged only two or three weeks before he made his will. Those present at the time of making the will and another testified to the mental capacity of the testator at the time of so making it; and the will was sustained although contested on the ground of mental incapacity, etc.

In re Blackfeather, Campbell v. *Prophet*, 153 Pac. 839, points 5 and 6, the Supreme Court of Oklahoma, Division 4, held:

> " *5.* A presumption of sanity goes with every one, and the burden of proving unsoundness of mind in a will contest rests upon the contestant."

> " *6.* The only thing that courts and juries should be concerned with in will contests is whether or not there was testamentary capacity,

and are not warranted in reviewing the disposition of property made by a testator from the fact alone that such disposition was unreasonable, harsh, or unjust."

In *Latour's Estate*, 74 Pac. 441, the Supreme Court of California, from which state the probate laws of Oklahoma were taken, held:

> " Where a petition for probate of a will and contest are tried at the same time, the proponent should first present his preliminary proof in support of his petition, on which he has the burden of proof, which, if sustained, requires the contestant to introduce proof to establish his contest."

In *McConnell et al.* v. *Keir*, 92 Pac. 540, the Supreme Court of Kansas held:

> " In a proceeding for the probate of a will, the burden rests upon the proponents to establish its valid execution. But this rule is qualified by another, which requires only a *prima facie* showing of the validity of the will and its due execution to entitle it to probate."

These last decisions were cited with approval by the Supreme Court of Oklahoma in *Cartwright* v. *Holcomb et al.*, 20 Okla. 555, and in which it held:

> " A proceeding to contest a will under the law of the territory of Oklahoma is not a suit

at common law, wherein the parties were entitled to a trial by jury as a matter of right under the Seventh Amendment to the Constitution of the United States."

In the opinion of the case at bar and by decisions therein cited, it is shown that in the state of Oklahoma one is not entitled to a trial by jury in a will contest or probation; and where a jury is had, it is not binding on the court, but is simply advisory, and the court may adopt the verdict or ignore it altogether.

These federal acts are nowhere mentioned or referred to in the opinion of the Supreme or District Courts of Oklahoma; but they are set up and the rights of the plaintiffs in error are claimed in their answer or reply to the written contest filed by the defendants in error, and are, therefore, in the record in this case, and the state courts could not have reached the conclusion and judgments they did in this case without deciding these federal questions adversely to them; and the fact that these Acts of Congress are not mentioned in their decisions does not defeat the jurisdiction of this court, Loveland's Appellate Jurisdiction of Federal Courts, p. 685, where it is observed:

" If a federal question is fairly presented by the record and its decision is actually nec-

> essary to the determination of the case, a judgment, which rejects the claim, but avoids all reference to the federal question, is as much against the federal right as though expressed in terms. If the judgment as rendered could have been given without deciding a federal question, no federal question will be presumed to be involved and the jurisdiction of the Supreme Court fails." (Citing numerous decisions of this court.)

Plaintiffs in error contend that these state courts could not have rendered these judgments without necessarily involving these federal acts or their rights arising therefrom. If it was not necessary to probate this will, or the state court had no jurisdiction in such matters, their judgments against the validity of the will and attempting to nullify it by holding that Waco Bruner was not of sound mind when he executed it, are directly against these acts and provisions empowering him to make his will disposing of his property which was under the control of Congress and could be devised only as provided in such acts. Of course, the fact of whether he was, or was not, of sound mind, must be determined by some person or tribunal designated by law for that purpose; for, by section 23 of the Act of 1906, it is made a condition precedent that such Indians must be of lawful age and sound mind, before they are thereby permitted to make a will as therein provided. But Congress designated in the section what persons

and court should approve such wills. This provision confines that power to such person and court alone; and with that power to approve such wills the power and authority to determine whether the Indian is of lawful and sound mind, is necessarily implied, and with it the duty to do so, as heretofore shown in the previous part of this brief and decisions cited.

Again, if the state courts have jurisdiction in such matters, still the fact of testamentary capacity of such Indians to make a will is a matter which arises directly from said section 23 of said Act of 1906, and is largely the basis of the federal rights of the plaintiffs in error in this case; and a correct decision of that fact, under the law involved in the case, involves these rights. This empowers this court to review the whole evidence in the case, and to determine from that evidence whether or not, *as a matter of law,* that fact has been properly or improperly decided by the state courts, or whether the plaintiffs in error have been improperly deprived of their federal rights in the case. As above stated, it is the contention of the plaintiffs in error that the evidence herein adduced to show testamentary incapacity in Waco Bruner at the time of executing said will, does not have sufficient probative force in law to show mental incompetency in Waco Bruner; and that said judgments of said District and Supreme Court of Oklahoma, are not

sustained by sufficient evidence and are contrary to the law which governs this case; and, therefore, for the reasons here given, this court has jurisdiction of this case and to review all the evidence to determine their federal rights.

First Assignment of Error.

Having given the statement of facts, assignments of error, Acts of Congress, statutes and the decisions generally pertaining to the case, we will now take up the discussion of the several assignments of error:

The first assignment relates to the admission of the defendants in error that, after the close of the testimony on both sides and the parties were ready to argue the case to the jury, that the plaintiffs in error had made a *prima facie* case, etc.

This admission of defendants in error is to be found on page 85 of the record, and is as follows:

"ADMISSION OF COUNSEL FOR CONTESTANTS BEFORE ARGUMENT.

"*By the Court:*

" At the close of the evidence in the foregoing case and just before argument begun, Mr.

> Skinner, as counsel for contestants, stated in open court that the contestants admitted that the proponents had made out a *prima facie* case, and that the burden of proof was upon the contestants to show that there was undue influence used by the beneficiary to procure Waco Bruner's will, and that the burden was upon the contestants to show that the testator had not sufficient mental capacity to make a will, and this burden was voluntarily conceded by the contestants. And Mr. Skinner further stated that if the contestants did not show this by a fair preponderance of the evidence, the contestants conceded that they were not entitled to prevail on the two questions submitted to the jury."

It is apparent that these admissions of these contestants voluntarily put them out of court, and took all matters from the jury; and that this motion of the proponents should have been sustained, and judgment herein rendered by the court upon such admissions for the proponents and said will admitted to probate; for, in the very nature of the proceedings, after the testimony of both proponents and contestants had been submitted and the case closed, and "just before argument begun," these contestants admit that the proponents had still "made a *prima facie* case," how would it be possible for such contestants to *legally overcome* such "*prima facie* case?" Every chance or opportunity to so overcome it had already passed at the time such admission was thus made; for

the entry of the statement made by the court itself shows it was "at the close of the evidence in the foregoing case and just before argument begun." To say that it could be overcome by the wonderful, magical force and influence of the learned counsel for such contestants, before the jury in the argument of the case, it seems to me to rest such powers upon a basis which has no legal existence. It is not the province, nor in the power of counsel, in the argument of a case either before the court or jury, to *change* the facts in the case. He only presents the facts as they really exist as shown by the evidence adduced in the case; and when, "at the close of the evidence," and "just before argument begun," counsel admits facts to still exist which, thus existing, defeat his client's case, he thereby defeats his client's cause of action or defense, and however magical or fascinating may be his argument before the jury, it operates in legal force and effect as simply a waste of "its fragrance on the desert air." With the facts admitted to be against the defendants in error, and they assuming the burden of proving that Waco Bruner did not have mental capacity sufficient to make the will, and that even if he did have such capacity that N. V. Bilby unduly influenced him to make it, how would it be legally possible for them to prevail in the case? It is too plain for dispute that a judgment herein could not be rendered in their favor, and rejecting

the probation of this will, if full force and effect was given to these admissions thus made upon the record in the case. I submit that, in the trials of cases, counsel cannot make just *any* kind of an admission which relates to his case, and thereafter avoid it; nor can its force and effect be avoided by either the court or jury, if the opposite side insists upon its legal significance on the trial, and excepts when denied its benefits. But no attention whatever was given this admission by the District Court or jury in the case at bar; and when that court was asked to give judgment in favor of the plaintiffs in error, regardless of this special finding of the jury, which, in fact, is the very reverse of the legal effect of such admissions, the court refused to do so, and overruled this motion for such judgment.

By common law pleading, motions for repleader, for judgment *non obstante veredicto,* in arrest of judgment, etc., could be interposed on account of defective pleadings, even in the very face of a verdict of the jury to the contrary of such motions; and in section 5140 of the Revised Laws of this state, it is provided:

> " Where, upon the statement of the pleadings, one party is entitled by law to judgment in his favor, judgment shall be so rendered by the court, though verdict has been found against such party."

Section 4734 of said laws provides: "The pleadings are the written statements, by the parties, of the facts constituting their respective claims and defenses." The admissions of counsel for defendants in error were reduced to writing, as now shown upon the record on page 85, and by the dictation of the court itself, as there appears; but whether such admissions come within the express provisions of said section 5140 above quoted, is not altogether clear. If they do, there can be no doubt that the court erred in overruling the said motion of the plaintiffs in error for a judgment notwithstanding the special findings of the jury; for such statement having admitted that after all the evidence adduced in the case by proponents and contestants was thus submitted to the jury, the same then showed a *prima facie* case in favor of the proponents, this admitted that such proponents were entitled to a verdict and judgment in their favor, and to find otherwise would be erroneous.

But even if such admissions do not come within the technical meaning of the word, "pleadings," as so used in said section, still, we insist that the admissions are as binding on the contestants and fatal to their defense herein, as if embraced and included in said word, and said motion should have been sustained, and the court erred in overruling it.

Wigmore on Evidence, Vol. 4, section 2588, observes:

" An express waiver, made in court or preparatory to trial, by the party or his attorney, conceding for the purposes of the trial the truth of some alleged fact, has the effect of a confessory pleading, in that the fact is thereafter to be taken for granted; so that the one party need offer no evidence to prove it, and the other is not allowed to disprove it. This is what is commonly termed a solemn—*i. e.*, ceremonial or formal —or judicial admission, and is, in truth, a substitute for evidence, in that it does away with the need for evidence. * * *

" *Sec. 2589.* The effect which a judicial admission produces is of course an effect shared in common with certain other legal acts. In the first place, a *pleading* may, by confessing a fact, place it beyond the range either of needing evidence or permitting dispute; and an omission to plead in denial may have the same consequence. The distinction between a pleading and a judicial admission seems to consist in the circumstances that the latter may be made after issues joined or trial begun, and may thus counteract or diminish the effect of a pleading; that it is not a part of the required statements defending the parties' issues; and that it is therefore not subject to the rules of time, form, amendment, and the like, which governs allegations of pleading. * * *

" *Sec. 2590.* The vital feature of a judicial admission is universally conceded to be its conclusiveness upon the party making it, *i. e.*, the prohibition of any further dispute of the fact by

him, and of any use of evidence to disprove or contradict it. * * *

" *Sec. 2591.* A fact that is judicially admitted needs no evidence from the party benefiting by the admission. But his evidence, if he chooses to offer it, will even be excluded; *first*, because it is now as immaterial to the issues as though the pleadings had marked it out of the controversy (*ante*, Sec. 2); *next*, because it is superfluous and merely cumbers the trial (*ante*, Secs. 1863, 1904); and furthermore, because the added dramatic force which might sometimes be gained from the examination of a witness to the fact (a force, indeed, which the admission is often designed especially to obviate) is not a thing which the party can be said to be entitled to.

" *Sec. 2592.* The effect of an admission being to remove the fact from controversy, precisely as if no plea or demurrer had raised the issue, it follows that any fact whatever may be the subject of an admission, provided only that the fact does not require the court to violate those rules of public policy which even a contract could not override or displace. Consequently, the admission may relate to a fact proved by *evidence otherwise inadmissible* (by virtually waiving objection to it); or to a fact which the court might have *noticed as non-existent;* or to a rule of evidence *constitutionally sanctioned* for the benefit of the waiving party; or to some other rule constitutionally protected, in particular, to the failure to observe the requirements for *legislative proceedings in a statute's enactment.* Any other result would seem to be inconsistent

> with the general spirit and practice of our litigation, which judicially leaves to the parties the framing of their pleadings and issues and determines no objection not expressly raised by one of them. Moreover, unless the admission is expressly rejected at the outset by the opponent, the judicial refusal to recognize it would often permit unseemly breaches of faith by counsel who have agreed to the admission."

On this subject and to support the above text, the learned author cites numerous decisions and authority, in the foot-notes of the text. To the same force and effect is Greenleaf on Evidence (16th ed.), sections 168 and 205; Jones on Evidence, sections 257, 258 and 259, to which the attention of the court is specially directed, for the reason that the subject is there too extensively discussed to justify all its quotation in this brief, and where numerous decisions of the Supreme Court of many states and of the United States, are cited as authority, and among them are Kansas, and Oklahoma, and the case of *Oscanyan* v. *W. R. Arms. Co.*, 103 U. S. 261, 26 L. ed. 539, where it is held that "The trial court may direct a verdict for the defendant upon the opening statement of the plaintiff's counsel." To the same force and effect is *Lindley* v. *Atchison, etc., R. Co.*, 47 Kan. 432, 28 Pac. 201; see also, "Judicial Admissions," 16 Cyc, page 964 and thereafter, and the numerous citations of authority therein cited to the same effect.

In Am. and Eng. Ency. of Law and Practice, Vol. 2, pages 78 and 79, the author observes:

> " An attorney is, for the purposes of the trial, the agent of his client. And his formal admissions or declarations made within the scope of his authority and while acting in the discharge of his duties, are receivable against, and binding upon, his client; especially where they are made for the purpose of dispensing with the formal proof of some fact, and when so made they are conclusive."

And, under the head of "Judicial Admissions," on page 193, the same author says:

> " It is wholly unnecessary to offer proof of a fact admitted during the course of a trial, whether the admission is made in the pleadings in express terms or failure to deny the allegations of the adversary, or by the withdrawal of the pleadings in defense, or whether it is made by written stipulation, or orally. So conclusive are such admissions that a finding of a court, jury, or referee to the contrary will be reversed on appeal" (citing a long list of decisions on this subject in support of the text).

From this line of decisions and authority and the law on that subject, it appears that such admissions of the defendants in error so made upon the record in this case, are matters of very great importance and significance, in the ultimate determination of this

case; and plaintiffs in error submit that such admissions are final, and conclusive of the whole merits of the case in favor of said plaintiffs in error, and were sufficient within themselves to justify a judgment in the case probating said will; and that it was plain error not to probate the same after such admissions were thus made in open court. It will be borne in mind that the admissions were thus made, at the close of the case, and "just before argument begun." So, when made, all the evidence of both proponents and contestants had been adduced; the court had instructed the jury, and the case was ready for argument. The fact is that counsel for defendants in error made these admissions in order to get to open and close the argument before the jury as shown in the opinion of the State Supreme Court in this case; and by so doing, they were permitted to so open and close the argument.

The next feature to be considered under this head is: What is a "*prima facie* case," and what legal force has such a case? Had this admission come at the close of the testimony of the proponents, it would not have had such significance; for in that case, the contestants could have overcome that *prima facie* case by their testimony, if strong enough for that purpose. But when such concessions are made after the testimony of both proponents and contestants is all in and been submitted and the case is fi-

nally closed and ready for argument, it must be conceded that there is then no opportunity whatever for the contestants to ever overcome this *prima facie* case thus admitted by them as still existing in favor of the proponents. It is too plain for argument, that had the court, without this admission having been made, have come to the conclusion, at the close of all the testimony on both sides, that there was still a *prima facie* case made out by the proponents, it would have been error to have so found, and then refused to probate the will; or having so found and then probated the will, it would not be disturbed. Then, are not these contestants estopped by this admission that there still existed a *prima facie* case in favor of proponents, at the close of all testimony? Then was not the court also bound by such admission, and obliged to probate the will because of such admission? We submit that the proponents were so entitled to the probation of said will, and that the court was obliged to accept such admissions as final against said contestants, and should have probated the will.

The contestants admit that the burden of proving the undue influence and mental incapacity of the testator was upon them. This would have been correct even if such admission had not been made. *In re Latour's Estate*, 74 Pac. 441. So, this admission of *law* amounted to but little; but to admit, at the

close of all the testimony, that the proponents had prevailed to the extent of proponents having made such a *prima facie* case, and thus overcoming this burden of showing this undue influence and mental incapacity, is simply to admit that the will was entitled to probation. The grounds alleged in the written contest must be established by the contestants; and as to them, the burden of proof is on the contestants, *Idem.* To admit at the close of all testimony that the proponents had made a *prima facie* case, is simply another way of admitting that the will should be probated; for all the proponents had to do was to make a *prima facie* case to entitle the will to probate, and if this is not overcome by contestants, it is the duty of the court to probate the will. The court and jury in this case were relieved of the trouble of determining that the proponents had made out a *prima facie* case, by this admission; and both were bound by the admission.

In *McConnell et al.* v. *Keir*, 76 Kan. 527, 92 Pac. 540, it was held:

> " In a proceeding for the probate of a will, the burden rests upon the proponents to establish its valid execution. But this rule is qualified by another, which requires only a *prima facie* showing of the validity of the will and its due execution to entitle it to probate."

Here in the case at bar, this "*prima facie* showing" is admitted to have been made and still existed at the close of all the evidence on both the petition for probation and written contest. Then why was not the will entitled to probate on this admission? To say it was not, seems to me purely arbitrary and unwarranted by the law.

Again, *In re Latour's Estate*, the court observed:

> " Where a petition for probate of a will and a contest are tried at the same time, the proponent should first p r e s e n t his preliminary proof, which, if sustained, requires the contestant to introduce proof to establish his contest."

But, in the case at bar, the admission is made by contestants after they had introduced all their evidence, that proponents had still made out a *prima facie* case. How can they overcome it, when they have no additional evidence to offer after the admission? The remedy is not apparent; and we wait with a good deal of interest to hear the explanation.

In *Jones* v. *Jones et al.*, 137 N. Y. 610, 33 N. E. 479, the court observed:

> " He who asserts a lack of ability on the part of a grantor to execute a deed whose due execution is *prima facie* shown must prove that lack of ability by a preponderance of the evidence."

In the case at bar, the ability to make the will, as well as its due execution, publication, etc., were

all admitted after all evidence was in; for they admit proponents had made out a "*prima facie* case," which carries all such attributes with it.

As the law requires of the proponents the necessity of making out a *prima facie* case only for the probation of the will, and imposes upon the contestants the burden of establishing the grounds of their contest; and as the contestants in the case at bar admitted, after all evidence was in and the case was ready for argument to the jury, that the proponents had *still* made out a *prima facie* case, we respectfully submit that this *prima facie* case could not thereafter be overcome, as there was nothing whatever with, or by, which to overcome the same. It follows, therefore, that the will should have been probated on this admission, and that the court erred in overruling this motion of plaintiffs in error to set aside these special findings of the jury and render judgment probating the will notwithstanding the verdict of the jury.

But the Supreme Court of Oklahoma seems to have placed a different construction on this admission; and construed it to be harmless, and unimportant.

On page 93 of the record, it observed:

> " It is next insisted that counsel for contestants made certain admissions, after the close of

the testimony, that entitled the proponents to have the alleged will probated. The admissions were made while the court was considering the question as to who had the right to open and close the argument, and the substance of the admissions are: That the contestants conceded that the proponents had made out a *prima facie* case, and that *unless* the contestants had overcome this, by a preponderance of the evidence, that the will should be admitted to probate. We see nothing in the admission that deprives the contestants of the right to have the question of testamentary capacity determined, upon consideration of all the evidence. There is no merit in this contention."

It takes but a casual inspection of this admission on page 85 of the record, to see that there is no "*unless*" anywhere to be seen there. Nor do we think there is any "unless" provision or condition there, either express or implied, to indicate that the previous unequivocal admission "that the contestants admitted that *the proponents had made out a prima facie case,*" in anywise depended or was conditioned upon whether the contestants had overcome this *prima facie* condition or not by their testimony. The admission is unequivocal that "the *proponents had made out a prima facie case*"—"*had made out*"; indicating and of course meaning that regardless of all the evidence of contestants that the proponents had still made out a *prima facie* case which was all

that was necessary to entitle the will to probate, under the law and decisions we have cited. It was the same thing as if the contestants had said on the close of all the testimony and the case was ready to be finally submitted to the court: "We now concede that the proponents have made out a *prima facie* case; and under the law governing this case, the proponents are entitled to have the will probated at this time, notwithstanding the evidence of contestants upon whom the law imposes the burden of proof to establish undue influence in procuring the will and the testamentary incapacity of Waco Bruner to make the same," etc. The further admissions down to the first period, namely, that the burden of proof was on contestants to show undue influence, mental incapacity, etc., are simply admissions of *law*, with which the jury had but little to do, but were matters for the court alone.

Then, was the situation relieved by the last admission, namely:

> "and Mr. Skinner further stated that if the contestants did not show this by a fair preponderance of the evidence, the contestants conceded that they were not entitled to prevail on the two questions submitted to the jury."

At best this is again nothing but a proposition of law thus admitted; for unless they prevailed by a

fair preponderance of the evidence, they, of course, would fail in their proof of such undue influence and mental incapacity as to which the law imposes the burden of proof upon them, as previously thus admitted. Again, what does the word "this" there used, refer to? Does it mean the law previously admitted? or to the undue influence, or mental incapacity? Take it as meaning the latter which is most favorable to contestants, we ask: How could undue influence or mental incapacity be shown by "the fair preponderance" or otherwise, after contestants had previously admitted unequivocally at the close of the case and all the evidence on both sides was in and the case ready to submit, that "*the proponents had made out a prima facie case?*" That is, with all the evidence thus in and submitted, still with it all in and duly considered, the proponents still had made out a *prima facie* case in their favor, which admission precluded the jury on such matters and entitled proponents to the probation of the will. Suppose after all the evidence was in and finally submitted, the court itself had reached the conclusion, as so admitted, "that the proponents had made out a *prima facie* case," notwithstanding all the testimony of contestants, would or could there be any doubt what the duty of the court would have been under such a conclusion? The court would undoubtedly have probated that will. Then, what difference

should there be in the court finding that proponents had made out a *prima facie* case, and that fact being admitted by the contestants themselves to the court, after all the evidence was in and the case ready to be submitted? Whether undue influence or mental incapacity could be shown to, or considered by, the jury on the argument of the case, was foreclosed by the previous admission that proponents had made out a *prima facie* case; and such matters were no longer open before either the jury or the court to be determined. They had been solemnly admitted in the record in open court and were binding on the court and jury; and the motion of proponents to set aside the verdict and give them a judgment in their favor notwithstanding the verdict, ought to have been sustained by the court. The court did sustain it as to the verdict finding that the will was procured by undue influence because there was no evidence to support it. But declined to set it aside as to mental incapacity and adhered to the verdict on this point as its own finding of this fact. Thus, this becomes the only fact involved in this case, and arises out of the federal Acts of 1906 and 1908, and from which the federal rights, title and interests of the plaintiffs in error are derived, and here presented.

Had the trial court accepted this admission of contestants that the proponents, at the close of all

the testimony, had made out a *prima facie* case, and rendered judgment accordingly and probated this will, the plaintiffs in error would have been saved their federal rights arising under these federal acts. But having not done so but holding in the very face of this admission that, at the time of making his will, Waco Bruner did not have testamentary capacity to make it, they have been deprived of such rights, and we believe wrongfully and without authority of law in so doing; and that this court has jurisdiction on this ground alone to reverse these judgments and thereby restore their rights arising under these federal acts and the right and authority of said decedent to make said will, as this is the admission of the fact—mental capacity—of Waco Bruner to make the will—admitting that proponents had shown a *prima facie* case—by and through which these federal rights arose from these acts.

It, therefore, follows that these judgments and decrees of the state courts refusing to probate this will on the ground that Waco Bruner did not possess testamentary capacity at the time of making it, are plainly contrary to this voluntary admission of contestants, made after all the evidence had been adduced and in open court to the very court itself on such trial, that the proponents had still made out a *prima facie* case. A *prima facie* case was all re-

quired in law of the proponents, in order to entitle them to the probation of the will; and that fact being thus admitted by the contestants to the court and on the trial and after all evidence was in, and just before the argument, as shown by the admission itself, it seems to us that it was the plain duty of the court to probate that will even on that admission; and that it was plain error not to have done so. This admission of this material fact, was indirectly an admission of these federal rights of the plaintiffs in error arising out of that fact. And the failure or refusal of the trial court to render judgment on such admission for the probation of said will, was a denial to the plaintiffs in error of their federal rights, title and interest in the property thereby devised, contrary to said Acts of Congress, in which case this court has jurisdiction in this case and authority to review the whole record including the whole testimony taken in the case, under the decisions we have heretofore cited on that subject.

Second Assignment.

This assignment, tersely expressed, involves three propositions: *First,* is the probation of a will of a full-blood Indian of the Five Civilized Tribes, executed as provided in the Acts of Congress of 1906 and 1908, necessary to its validity and to vest title to the property therein embraced, upon the death of such testator? *Second,* has the probate or other courts of the State of Oklahoma, jurisdiction in such matters, or authority to require such wills probated and thereby subject to the laws of Oklahoma pertaining to the probation of wills of other citizens under its jurisdiction, and as in such laws provided? And, *third,* even if such state courts had jurisdiction of such Indian matters, does the testimony taken in this case and found in the record, show or establish, as a matter of law or fact, that, at the time said will was executed, Waco Bruner did not possess testamentary capacity sufficient to make said will; and were the finding of such fact by the court and jury, and said judgments refusing to probate such will, sustained by the law and the evidence in this case?

If not, then the plaintiffs in error have unjustly been deprived of their federal rights, title and interests arising out of such matters, contrary to these Acts of Congress; and as this procedure is one of the methods prescribed by Congress for bringing

such matters before this court for review and correction, this court has jurisdiction to determine all three propositions and all other matters involved in this proceeding.

We have already touched upon these matters in the previous part of this brief where considerable authority and decisions are given on the subjects; and it is not our purpose to again go over those cases or matters very extensively at this time, but kindly ask the court to consider the same in connection with this assignment.

Section 485 of Thompson on Wills is as follows:

> " Before any will can have any force or validity it must be probated. To probate a will means to prove before some officer or tribunal, vested by law with authority for that purpose, that the instrument offered to be proved is the last will and testament of the deceased person whose testamentary act it is alleged to be, and that it has been executed, attested and published as required by law, and that the testator was of sound and disposing mind. In other words, the probate of a will is a civil proceeding to establish the validity of a will. It is a proceeding *in rem,* calling for the exercise of the judicial powers of the court.
>
> " The probate of a will of real estate was unknown to the common law, but a will of personal property was probated in the ecclesiastical courts. So in the absence of a statute, there is

> no necessity for the probate of a will of real estate, and in order that the will operate as a conveyance of the land it must be proved in a suit by proof of the testator's signature. But by the statute in most of the states of this country wills of both real and personal property are expressly required to be probated, and any attempt by provisions of the will to dispense with this statutory requirement will be fruitless."

The author cites many decisions to support his text, among which are the decisions of this court in *Armstrong* v. *Lear*, 6 L. ed. 589; *Robertson* v. *Pickrell*, 27 L. ed. 1049; and *Campbell* v. *Porter*, 40 L. ed. 1044.

The syllabus in this last decision is as follows:

> " *1.* A judgment of the Supreme Court of the District of Columbia admitting a will to probate may be reviewed by writ of error in this court. The proceeding for the probate of the will is not a suit in equity, but one in which the parties have the right to trial by jury.
>
> " *2.* The question of the jurisdiction of the court below can be raised by either party or by the court on its own motion.
>
> " *3.* The Supreme Court of the District of Columbia has no power to admit a will or codicil to probate as a devise of real estate."

The special reason for this holding was that at common law, wills of real estate did not have to be

probated; and there was no statute of Maryland or the District of Columbia, requiring such wills to be probated; and, therefore, the court had no jurisdiction to probate the same. In that decision and in the others therein cited and referred to, this court closely scrutinized the statutes to find an express, or necessarily implied, provision authorizing and requiring the probation of a will for real property. But none being found, the court held as above indicated in said syllabus. Then, we may again with propriety ask: Where has Congress expressly, or by necessary implication, provided or required that the will of a full-blood Indian for his restricted property, *real* or *personal*, executed as provided in sections 23 of the Act of 1906 or 8 of the Act of 1908, shall be, or can be, probated in the courts of the State of Oklahoma, either under the laws of Congress or said state? If the probate of a will in the District of Columbia was void because there was no law there requiring it, why would it not be so in Oklahoma, especially as to these full-blood Indians where Congress had made no provision other than such as provided in the above acts of that body? Again, why is not a compliance with said acts all the probate of such wills intended by Congress to make them valid and effectual? Here, we have the officer and tribunal provided by Congress before whom such wills may be acknowledged, and by whom they may be approved; and it is in section 23

expressly provided that such Indians may make their wills by such compliance; and by so doing, they may dispose of both their real and personal property. Can it be said that such wills must, in addition to these provisions of Congress by which the Indian is empowered to alienate his said property by will, be also subject to the probate laws of the State of Oklahoma, before the title to the property can, or will, pass under the will of such Indian? If such wills have to be so probated before said state courts (unless as a matter of form only), then, inevitably they would be subject to all the grounds and provisions of the state statutes for avoiding wills, such as undue influence and fraud in its procurement, mental incapacity, etc. Such a conclusion inevitably makes this Act of Congress subject to the probate laws of Oklahoma, and subordinate thereto, and the Acts of Congress and the beneficial provisions thereof may at any time after the death of such Indian, be totally destroyed and annulled, by a probate or other court of said state. This, in turn, would make the laws of Oklahoma the supreme law in such matters, in the very face of section 1 of the Enabling Act reserving all such matters to Congress alone, and the Constitution of the United States wherein it provides:

> " This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be

made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

We know that the Constitution and Laws of Oklahoma are not superior to these Acts of Congress; nor will they ever be. And we know that all matters respecting these full-blood Indians and their property were expressly reserved and excepted to Congress alone, in section 1 and other provisions of the Enabling Act, as effectually as if said act had never been passed; and that this Act of 1906 was passed by Congress *before* the Enabling Act, and was then in full force and effect in Indian Territory. It may for a moment be supposed that, under the provisions of the Enabling Act, the probate courts of Oklahoma, on the advent of statehood, succeeded to the probate powers of the United States Courts of Indian Territory. But still, prior to the Act of 1906, there was no law even of Congress, by which these Indians were empowered to alienate their restricted lands by will, *Hayes* v. *Barringer*, 168 Fed. 221; *Tayler* v. *Parker*, 59 L. ed. 121, except in section seven of the Original, and section 16 of the Supplemental, Creek Agreements which pertained alone to homesteads, etc. But in neither of said sections nor in said Acts of 1906 or 1908, are there any express, or necessarily implied,

provisions for the probation of such wills of full-blood Indians. Hence, under the above decisions, we must infer no such authority or power was ever given by Congress; and, therefore, none exists.

The case of *Gray* v. *Coffman*, 3 Dill. 401, was an Indian matter involving the will of John Hicks and his son. They were Wyandotte Indians and belonged to that tribe. About 1842, this tribe and the United States made a treaty at Sandusky, Ohio, by which the Indians gave up their lands in Ohio or a material part thereof for lands reserved to them in Kansas. In this treaty, 640 acres were reserved to John Hicks in the lands in Kansas. Hicks came on to Kansas and wandered about without selecting this land until 1853 when he died and left this land, or rather the right thereto, as it was not then selected, by will to his two sons. One of these sons died in 1856 without having selected the lands, and disposed of his interest therein thus obtained from the will of his father, by will. Neither of these wills was ever probated under the laws of Kansas, but seem to have been made and presented for record or probation, according to the laws and customs of this tribe. In that case, it was held that said wills were valid and passed the title to said lands although they had not been selected when the wills were executed.

In section 8 of the Act of 1908, the judges of County Courts of Oklahoma are also empowered to

approve such Indian wills, the same as United States Commissioners and the United States Court mentioned in section 23 of the Act of 1906. Now, suppose a full-blood Indian of such tribes should present his will for approval to one of these county judges and said judge approves the same. After the death of that Indian, this same will is presented to this same county judge for probate, as could easily happen in any of these cases. Could it be supposed that Congress did not foresee that such could take place, if the will had to be probated under the laws of that state? On such a will being so presented to such judge, it would be the imperative duty of that judge to first ascertain whether such Indian was mentally competent to make the will, as only such Indians as possess a sound mind and are of lawful age, can make a will under said section 23 of the Act of 1906. Not to make this investigation before approving the will, would not only be violating said section, but be a flagrant abuse of the power to approve the same. The law will not presume such judges capable of such dereliction of duty or abuse of power thus conferred upon them; and when such a will is once approved by such officers, the law will presume that such officers did their duty; and as Congress has thus conferred upon such officers and court the exclusive power to approve such wills, the acts of such officers or court, mentioned in sections 8 and 23 above referred to, are

conclusive and final in such matters, and cannot be collaterally attacked except for fraud in procuring such approval or want of such authority in the officer, according to the decisions heretofore cited on that subject. To require this same county judge to go into the same matters as to such mental capacity to make the will, when it is presented before him for probate, after he had already approved the will, would seem to be a vain and useless thing required by Congress, if such wills were ever intended by it to be probated under the laws of this state. Again, would not the County Court be precluded in such matters, after the will thus presented for probate before it, had previously been approved by the very judge who is presiding over such court in such matters? If his previous approval of the will is final and conclusive that the Indian was of lawful age and of sound mind when he made the will which must be determined by said judge before he made the approval, that would, indeed, seem to place the validity of that will beyond dispute or controversy, before such County Court or any other court, except for fraud in procuring such approval or want of authority in such judge. To say that such approvals are not final and conclusive of the validity of such Indian wills executed as prescribed in said section 23 of said Act of 1906 or sections 8 and 9 of said Act of 1908, seems to me, to simply assert and hold that said sections do

not mean what they say; and that such Indians *cannot* make their wills for their restricted lands, even though they conform in every respect with the provisions of these acts, in which Congress has provided they *can* so execute them and thus alienate their restricted lands. To hold that such full-blood Indian wills must first be probated, according to the laws of Oklahoma, before they are valid or effectual to pass the title to the property therein embraced, is simply to hold that said laws of Oklahoma prevail over these Acts of Congress, even where such wills have in fact conformed to all the requirements of such acts. We know such is not the law; and that acts performed under authority of Congress and as therein provided, are not subject to the laws of the state and have to conform therewith, before they are valid or effectual, unless such Acts of Congress either expressly so provide, or the same is necessarily implied from the provisions of such acts. Jurisdiction to probate these Indian wills when executed according to these acts, in the courts of said state, is nowhere expressly conferred upon them; nor do we see where such jurisdiction or authority are necessarily implied in such acts. If such jurisdiction does not so exist, then, it must follow that there is no necessity for the probate of such wills, and such probation would be useless, and a refusal to probate the same could not invalidate such wills or destroy the rights of property of those

claiming under them when duly executed as required in said Acts of Congress.

The case of *Homer et al.* v. *McCurtain*, 40 Okla. 406, involved incidentally the judgment of a probate court of Oklahoma in probating an Indian will which seems to have been contested; but the grounds of contest do not appear in the case so reported. It does not appear that the jurisdiction of such probate court to probate such will was raised in that case or directly passed upon by the state courts. But it does seem to have passed upon whether the acknowledgment and approval of such wills by the court or officers designated in said sections of said acts, "involves the question of due execution and attestation;" and decides the same "affirmatively." Such matters must necessarily be involved before such court or officer when so taking such acknowledgment or making such approvals of such wills. For, unless the will was so framed as to be testamentary in form and character and pass title to the property it embraced, when duly probated, if necessary, it would not be an effectual will at all; and would be no more effectual *after* approval than *before* approval. Hence, the power and authority of such court and officers to ascertain and determine the proper form and execution of the will is necessarily implied in the power to take the acknowledgment and give the approval of such wills.

As before stated, the jurisdiction of the probate courts of Oklahoma in these Indian matters, is considered and discussed by the state Supreme Court in *Jefferson* v. *Winkler*, 26 Okla. 653, 110 Pac. 755, and *Bell* v. *Fitzpatrick*, 157 Pac. .....

In this first case, said court observed:

> " By one of the provisions of the Enabling Act the people of the state, acting through their representatives and delegates to the Constitutional Convention, were required to, and did, by an ordinance irrevocable, accept the terms and conditions of said act. It is unnecessary to comment upon the extent or limitation of the authority over the lands and property of such Indians that is by said provision of the Enabling Act reserved to the United States Government, we think it cannot be questioned that said authority reserved is sufficient to retain in the Government of the United States jurisdiction over the restricted lands of said Indians to determine and provide how and in what manner such restrictions shall be removed, and that until such restrictions are removed, the lands of such minor allottees are not within the jurisdiction of the probate courts of the state, with power in said courts to order the sale thereof for any purpose. Since the power to remove such restrictions is held within Congress, it may say upon what terms and conditions they will be removed, and under the *supervision of what court or officer the sale of same may be made.*" (Italics are mine.)

This excerpt was cited with approval by said court in *Bell* v. *Fitzpatrick,* after which it was there observed:

> " And Congress having said in the act under consideration that said lands may be sold through the probate court, it naturally follows that the power of the probate court in matters of the kind thus delegated is exclusive and that a sale may not be made in any other court or any other manner."

See also on this same subject matter, *Stephens* v. *Smith,* 19 L. ed. 933, where this court held to the same effect in another Indian case respecting the sale of her lands.

Without going further, it does seem to us that on the same principle, when Congress prescribed how these Indians could make their will for their restricted lands by having them acknowledged and approved as provided in said acts, that of itself precluded any other manner or the interference or supervision of any other court or person than those therein mentioned; and that such probate courts for so doing will meet the disapproval of this court.

But before going into the evidence in this case, I desire to call the court's attention to a decision of another division of the Supreme Court of Oklahoma, rendered fourteen days before the decision in this

case, and which also involved the probation of a will which was denied by a District Court of said state on the ground of testamentary incapacity, but was reversed by said division of said Supreme Court, for the reason that the testimony in the case was not sufficient to show such incapacity. This is the case of *In re Blackfeather's Estate, or Campbell v. Prophet*, 153 Pac. 839. As there shown, that decision was rendered on the 7th of December, 1915; while the decision in the case at bar, was rendered on the 21st of the same month and year, making only 14 days between them. The evidence in that case against testamentary incapacity is stronger that in the case at bar; but said Supreme Court refused to abide by it and reversed the verdict of the jury and trial court which found against the probate of the will, and directed the will probated. The testimony is so nearly alike in character in that case and the one at bar, we will here set out that case in full, as follows:

" In re BLACKFEATHER'S ESTATE.

" CAMPBELL v. PROPHET.

" (No. 5520.)

"(Supreme Court of Oklahoma. Dec. 7, 1915.)

" *(Syllabus by the Court.)*

"*1. Wills — Contest After Probate — Evidence.* Under section 6219, Rev. Laws 1910, which provides for contesting a will after

probate, the evidence introduced at such contests must relate to facts discovered after the probate of the will.

"2. *Appearance — "General Appearance" — Probate—Notice—Contest.* In contests instituted under section 6219, *supra*, where the heirs were not served with notice of the will, but where the contestants invoke the jurisdiction of the court upon the merits of the case, this will operates as a general appearance, and the contest in such cases should be tried upon its merits.

"3. *Wills—Contest—Appeal—Parties.* Where the contest is instituted by one party, under sections 6503 and 6504, Rev. Laws 1910, a second party, who fills the requirements of these sections of the statute, may take an appeal to the District Court.

"4. *Wills—Testamentary Capacity—Presumption.* The fact that the testator was an aged person in no way operates against the validity of the will, but every presumption tends to uphold its validity.

"5. *Wills—Contest—Testamentary Capacity—Burden of Proof.* A presumption of sanity goes with every one, and the burden of proving unsoundness of mind in a will contest rests upon the contestant.

"6. *Wills—Contest—Revocation of Probate—Grounds.* The only thing that courts and juries should be concerned with in will contests is whether or not there was testamentary capacity, and are not warranted in

reviewing the disposition of property made by a testator from the fact alone that such disposition was unreasonable, harsh, or unjust.

"7. *Wills—Contest—Testamentary Capacity—Sufficiency of Evidence.* Evidence in this case examined and held to fully sustain the sound and disposing mind and memory of the testator, and uphold the validity of the will.

" Commissioners' Opinion, Division No. 4. Error from District Court, Craig County; Preston S. Davis, Judge.

" Proceedings by Maria Prophet against L. B. Campbell, executor, to revoke the probate of the will of Nancy Blackfeather, deceased. From a judgment revoking the probate, the executor brings error. Reversed and remanded, with directions.

" W. H. Kornegay, of Vinita, for plaintiff in error. Clyde McGary and Wm. P. Thompson, both of Vinita, and Anselan Buchanan, of Nowata, for defendant in error.

" Matthews, C. This is an appeal by L. B. Campbell, executor of the will of Nancy Blackfeather, deceased, from a judgment of the District Court of Craig County revoking the probate of the will of the said Nancy Blackfeather, said will having been admitted to probate in the County Court of Craig County on the 15th day of February, 1909, and letters of administration issued to said L. B. Campbell.

" On the 26th day of February, 1909, one Ella Tucker filed her petition to revoke the probate of the said will, said petition conforming to the requirements of section 6219, Rev. Laws 1910. The contest of the said Ella Tucker was heard on the 1st day of April, 1909, by the County Judge, who found against the contestant and refused to revoke the former probate of the will. On the 1st day of May, 1909, Maria Prophet gave the following notice of appeal:

" 'NOTICE OF APPEAL.

"*To Theo. D. B. Frear, Judge of the County Court.*

" 'Maria Prophet, one of the heirs at law of Nancy Blackfeather, deceased, herewith give notice of an appeal from the order of the court, rendered in this matter on the 1st day of April, 1909, overruling contest of probate of will filed by Ella Tucker, a portion of which order is as follows: "It is therefore by the court, ordered, considered, and adjudged that the will admitted to probate by order of this court on the 15th day of February, 1909, as the last will and testament of Nancy Blackfeather, deceased, is valid and was duly and legally admitted to probate on the day and year last above mentioned." The grounds of said appeal are as follows: The court erred on both questions of law and of facts in not sustaining the contest of probate of will by Ella Tucker, one of the heirs of deceased, for the reason that the testimony showed:

" 'I. That said purported will was never properly executed and acknowledged.

" 'II. That no notice of the probate of such purported will was ever served upon the heirs as is required by law.

" 'III. That at the time of the execution of the purported will, deceased was not of sound mind, was not competent to make a will, was under duress and that undue influence was brought to bear on her.

Maria Prophet.'

" At the same time she filed the following verified affidavit:

" 'Affidavit on Appeal.

" 'Maria Prophet being first duly sworn states: That she is 47 years of age, and that she resides in Ottawa County, State of Oklahoma, and that her post office address is Seneca, Missouri. Affiant further states that she was a niece of Nancy Blackfeather, deceased, and as such niece, is interested in the estate of Nancy Blackfeather; that no notice was ever served upon her of the probate of the will of said Nancy Blackfeather, deceased, nor did she have any knowledge that said Nancy Blackfeather ever made or attempted to make a will; that she is a party interested in the probate of such will and as such niece of deceased, she appeals from the decision of the court made and entered on the 1st day of April, 1909, admitting to probate the purported will of Nancy Blackfeather, deceased and overruling the contest

of Ella Tucker. Affiant further states that she had no knowledge of the hearing of the contest of said will after probate; that she was not a party of said hearing, and that she was not present at such hearing.

Maria Prophet.'

" The case was tried by a jury who found for the contestant, and the court made finding of facts and conclusions of law, which also was in favor of the contestant. The executor has appealed, and the first assignment of error we will notice is the contention of appellant that there was no evidence introduced at the trial of this cause showing that the evidence relied upon for setting aside the probate of the will had been discovered since the will had been admitted to probate. There is merit in this contention, with the exception of the second ground of contest, which alleges that no notice of the probate of the will was ever served upon the heirs as required by law.

" Each of the heirs testified at the trial that they had not received any notice of the probate of the will, and there is no evidence, record or otherwise, showing that such notices were mailed as the statute provides. The appellant offered no evidence on that point, and did not attempt to show that the post office address of the heirs was unknown to him at the time of the filing the petition for the probate of the will.

" If the service of notice had complied with the statute then under the decision *In re Impunnubee's Estate,* 152 Pac. 346, by Chief Jus-

tice KANE, the contention of appellant would be upheld by us here because all the evidence introduced by appellee upon the merits of the contest was evidence of facts that took place at the time and prior to the execution of the will in controversy, and the main witnesses to these facts were the contestants themselves and near relatives, showing that the facts urged against the competency of the maker of the will were within the knowledge of the contestants long before the will was filed for probate, and were not facts discovered since the probate of the will.

" [1] If section 6219, Rev. Laws 1910, providing for the contest of a will after probate and being the statute under which contestants proceeded, needed any judicial interpretation, then we find that interpretation in the above-cited case of *In re Impunnubbee's Estate* which holds that, as specified in this statute in very plain and unambiguous language, the grounds of contest of a will after probate must be based upon evidence discovered since the probate of the will, and in such a trial evidence in the knowledge of the contestant at the time of the probate should be excluded as incompetent.

" [2] But in the instant case contestants were not served with notice of the probate, and for that reason had no opportunity to be present at the time of the original probate and present their objection to the will. The law is, all parties have a right to be heard in cases in which they are interested, and before any court can acquire jurisdiction to hear and determine

any contested matter, the adverse parties must have notice of the contemplated proceeding in some way fixed by statute, and in the absence of notice there is no jurisdiction, and hence no binding judgment can be rendered. Under such conditions if the contestant had made a special appearance for the purpose only of attacking the decree of the County Court admitting the will to probate, then the court would have been bound to have vacated his order probating the will and give the contestant a hearing in the original proceedings, but having voluntarily appeared and invoked the jurisdiction of the court upon the merits of the case and having elected to proceed under said section 6219, Rev. Laws 1910, this operated as a general appearance, and her right to attack the jurisdiction of the court was thereby waived; but we must hold that she did have the right to have the case heard and determined upon its merits by a trial *de novo*, and such a hearing was had in the County Court who found against contestant, and again in the District Court who found in her favor.

" [3] The contest in the County Court was instituted by Ella Tucker, and decision rendered thereon on the 1st day of April, 1909, and on the 1st day of May, 1909, Maria Prophet filed an appeal to the District Court in conformity with sections 6503 and 6504, Rev. Laws 1910. It appears that the appeal is regular, and every requirement of the statute has been complied with. She sets out in her affidavit of appeal, among other things, that she is a niece of the decedent and interested in the estate; that no

notice of the probate of the will was ever served upon her, and that she had no knowledge of the hearing of the contest of said will after probate, and was not present at or a party to such hearing. She was one of the heirs of the deceased, and the statute gave her the right to take the appeal in this manner.

" This brings us to the merits of the controversy, and that was whether or not the deceased, Nancy Blackfeather, at the time of the execution of the will was competent to make a will and was she under such duress and undue influence as to invalidate the said will? The evidence upon this question was extensive on each side. It appears that the said Nancy Blackfeather was a full-blood Shawnee Indian and about 84 years of age at the time of her death. That she died on the 8th day of January, 1909; that on the 2d day of January, 1909, she made the following will:

> " 'I, Nancy Blackfeather, of Vinita, Oklahoma, being now of sound and disposing mind, do hereby make, publish and declare the following to be my last will and testament hereby revoking and canceling all other or former wills by me at any time made.
>
> " '*(1)* I direct the payment of all my just debts and funeral expenses.
>
> " '*(2)* I hereby give, d e v i s e and bequeath to L. B. Campbell, in consideration of money furnished me by him and paid out by him for me at my instance and request and of the cause and attention given by

him to the management of my business affairs and in looking after my personal comfort, the following described land, situated in Craig County, Oklahoma, to-wit: the NW4 of SW4 of section 29, township 24, and range 21, consisting of 40 acres, and being my homestead allotment.

" '*(3)* I hereby give, devise and bequeath to my stepdaughter, Eliza Bluejacket, all the rest, residue and remainder of my property, both real and personal.

" '*(4)* I hereby appoint and designate L. B. Campbell above named, of Vinita, Oklahoma, sole executor of this my last will and testament.

" 'In witness whereof, I, Nancy Blackfeather, have to this my last will and testament, consisting of one sheet of paper, subscribed my name this 2d day of Jany., 1909.

her

" NANCY X BLACKFEATHER.'

mark

" At the time of her death, her nearest of kin and legal heirs were her nieces, the aforesaid Ella Tucker, Maria Prophet, and the children of some deceased nephews, she having no children of her own. The will was witnessed by one John Choteau, an interpreter, and A. M. Clinkscales, a physician who attended the deceased at the time the will was signed and was her family physician.

" Upon the part of the contestants, Paul F. Mackey testified to having drawn the will at the

request of the said L. B. Campbell, who informed him of the desired terms of the will, and that he did not see the decedent.

" Mrs. Maria Prophet, the appellee, testified that she was a niece of the deceased, and that she never had any notice of the probate of the will.

" Ella Tucker testified that she was living in Vinita at the time of the death of her aunt, the decedent; that she received no notice of the probate of the will; that her relations with her aunt had always been friendly; that the decedent was a full-blood Shawnee Indian and could talk English but little; that she saw her aunt about a week before she died, and that she was then very low and weak.

" Ada Parrish testified that the decedent was her great aunt; that she attended decedent just prior to her death, and that during her last illness she was delirious and did not recognize anyone and failed to recognize her during the last week of her illness and was unconscious at the time she made the will, and that a day or so before that she failed to recognize her brother, although she had known him all her life; that there was no ill feeling between decedent and Mrs. Tucker and Mrs. Prophet, her nieces; that she was incompetent to make a will at the time she executed the will in controversy.

" Alberta Tucker testified that she was with the decedent frequently just prior to her death, and that she was then very sick, but that she did not talk to her, and that for the last three days prior to her death she would not notice her.

" Bud Tucker, for contestant, testified that the decedent was his great aunt and had known him all his life; that he visited her on the 2d of January, 1909, between 10 and 11 o'clock a. m., and at that time she was unconscious and did not recognize him while he was there, and that she was not in any condition to transact business.

" For appellant, Dr. Neer testified that the only time he had ever seen decedent was on the night of the 3d of January, 1909; that he called professionally to see decedent, and that she answered his questions relative to the location of her pain in a rational way, and that, while she was weak physically, his impression was that she was of sound mind, but he did not see her except for a short while; that she was a very old woman, and died four or five days thereafter.

" Dr. Clinkscales next testified that decedent died on the 8th of January, 1909, and that he was her attending physician, and that the will in controversy was executed by decedent on the 2d day of January, 1909, in the presence of himself and Mr. Choteau, and that to the best of his knowledge she understood what she was doing and was of sound mind; that decedent never required an interpreter during his investigation as to her condition in prescribing to her in her illness; that Mr. Campbell read the instrument over to her and then Mr. Choteau interpreted it to her; that she was then very weak; that the instrument was already drawn when Mr. Campbell went to decedent's residence to have the same signed; that she signed the instrument by mark by touching the pen, and that after it was read to her in

English by Mr. Campbell and in the Shawnee language by Mr. Choteau she said that was the way she wanted it.

" John Choteau, for contestant, said that he was a Shawnee citizen, and that he was one of the witnesses to the will, and that before decedent executed the same he read it and interpreted it to her and explained what it was; that decedent could not talk the English language very well, but understood almost every word that was said to her in English; that after he explained it to her she said 'that it was just exactly the way she wanted it'; that her mind was all right, and that she talked as sensible as she ever did at the time she signed the will; that Mr. Campbell wrote her name, and then she made her mark, and that Dr. Clinkscales and he witnessed it.

" L. B. Campbell, appellant, testified that he was one of the beneficiaries in the will, and that the decedent sent for him to come down to her residence, and she told him she wanted to have her will made and how she wanted it; that he then had a lawyer draw the will up in accordance with what she said; that he inquired of Dr. Clinkscales, her physician, when he would be at her residence, and that he went at the time he said he would be there; that decedent also asked that he have John Chouteau present so he could interpret the words as she might not understand some of the words in it; that he read it over to her very slowly in English, and then Mr. Choteau read it and interpreted it to her in Shawnee, and that during the reading, a number of times, she

nodded her head, and at the close she said in English, 'That's the way I wanted it; it suits me exactly; I want it that way'; that he wrote her name, and she made her mark by touching the pen.

" Julia Isabel testified that she lived with decedent for two years just prior to her death and attended her during her last sickness; that she was sick about four weeks; that Mrs. Bluejacket also stayed with her during her last sickness; that decedent had a good mind when she was sick, and her mind was good when she made the will, and understood what she was doing, and knew everything all the time, and that in her opinion her mind was sound when the will was executed; that the decedent was 84 years old when she died; that Mrs. Bluejacket was a stepdaughter to decedent.

" Mrs. Eliza Bluejacket testified that she was one of the beneficiaries of the will, and that she was one of the attendants during her last illness, and that decedent was her stepmother.

" Mrs. J. M. Etter testified that she was acquainted with decedent during her lifetime and visited her during her last sickness and Mrs. Bluejacket was caring for her; that in her judgment decedent, on the 2d day of January, 1909, was competent to make a will at the time the will in controversy was executed.

" John Underwood had lived within a half block of decedent for two years, and visited her often, and visted her the last time four or five days before her death, and that she was as ra-

tional then as at any other time he had ever talked with her.

" J. R. Campbell stated he was a brother to L. B. Campbell; that he had known decedent about 25 years; that he was at her residence twice just before her death, and on January 2, 1909, her mind was sound; that he had been calling at her house for the past 20 years.

" [4] There appears no evidence in this case that attacks the general competency of the decedent to make a will. Although she was 84 years of age, no effort was made to show that *senile dementia* had approached, or that she had ever shown any symptoms of unsoundness of mind or eccentricities of any kind except at the very time the will was executed, but the evidence on both sides was singularly absent as to the general condition of her mind prior to the date of the execution of the will and the entire testimony was directed to her mental and physical condition on or near the date the will was executed, and related to the proposition whether or not she was in such a mental condition at that time as to understand the transaction, know its import, and intend to do the very thing that was done. The mere fact that she was an aged person in no way operates against the validity of the will made by her, but every presumption tends to uphold its validity. Underhill on Wills, Sec. 114.

" [5] A presumption of sanity goes with every one, and the burden of proving unsoundness of mind in a will contest rests on the con-

testant. *In re MacCrellish's Estate*, 167 Cal. 711, 141 Pac. 257, L. R. A. 1915A, 443. It is true that the contestant appears here with the advantage of having a verdict of the jury and finding of the court on every point in her favor, and this fact should and does have great weight here, but is not controlling for this is a chancery action and this court should here consider the evidence and decide for itself if the verdict and findings of the trial court are warranted by the evidence.

" While the evidence shows that decedent was very old and feeble at the time she executed the will, yet that alone proves nothing. *In re Clark's Estate*, (Cal.) 149 Pac. 828. The infirmity of old age does not within itself establish the lack of testamentary capacity. While it is proven in this case that the decedent was a very sick woman at the time she executed the will, and in fact died within four or five days thereafter, yet the evidence introduced upon the part of the contestant is lacking in that force which should exist before a will is overthrown. Only three parties testified as to her incapacity, and two of these witnesses were children of one of the contestants and the other presumably a daughter-in-law. None but relatives gave testimony in their behalf, while there were a large number of witnesses who testified for appellant as to the soundness of decedent's mind at the time she executed the will; among those witnesses being two physicians, one of whom was her attending physician, and neither of whom, as far as the record shows, had any interest in the results of the trial. Another witness, whose testimony was in

favor of the validity of the will, was a woman who had lived with decedent two years, and apparently disinterested neighbors testified that her mind was sound when she executed the will. While the burden of proof was upon the contestants, yet it appears to us that the contestee has not only met the attack, but has gone further and proven almost conclusively that the decedent was of sound and disposing mind and memory at the time she executed the will and was fully conscious of what she was doing, and that the terms of the will expressed her own desire in the disposition of her property. *In re Hanson's Estate*, (Wash.) 151 Pac. 264; *Wisner* v. *Chandler*, 95 Kan. 36, 147 Pac. 489; *In re Silva's Estate*, (Cal.) 145 Pac. 1015.

" [6, 7] The only thing that can concern courts and juries in cases like the one at bar is whether or not there was testamentary capacity, and a will cannot be set aside because juries or courts called upon to review the disposition of property made by the testator may feel that such disposition was unreasonable, harsh, or unjust. *Dreisbach* v. *Spring*, 93 Kan. 240, 144 Pac. 195. The testator, being of sound and disposing mind and memory, has a right to dispose of his property as his caprice or whim dictates, and courts and juries have no right to deny him that privilege if he possesses the proper mental requisite at the time he executes the will. But in this case we are unable to find any injustice even in the terms of the will, nor does it appear to us as an unnatural will, and we fail to find therein any evidence of a desire to punish any one by reason

of a real or fancied grievance in failing to make them a devisee in the will, but the will does appear to us as emanating from a sound, just, and honorable mind. It appears that the said L. B. Campbell had purchased 40 acres of land from decedent, and paid her for the same in cash. We can readily understand how a fair-minded person under these conditions would naturally desire to perfect a title in this way where they had already received pay for the same.

" As to the other devisee, Eliza Bluejacket, the equities with her are even stronger. The evidence shows that the decedent was an aged Indian woman without children, and that Mrs. Bluejacket was a stepdaughter, who had lived with her for a long time, waited upon her, and was her friend and companion in her declining days, and it does not appear that her nieces, her legal heirs, had ever paid her any special attention, but had family ties of their own, or that there had ever been any special attachment between them and decedent, and it appears to us proper and right, if decedent so desired, that the remainder of her property, after validating the above-named deed in this manner, should be bestowed upon Eliza Bluejacket in preference to her nieces.

" There was no evidence in the case tending to show that any undue influence was exercised over decedent at the time she made the will. We believe the evidence, equity, and the law is with the executor, L. B. Campbell, in this case, and for these reasons the judgment should be reversed and remanded, with instructions to the

trial court to enter judgment in favor of said executor, upholding the validity of the will.

" *PER CURIAM.* Adopted in whole."

Testimony of Defendants in Error.

As to all the witnesses herein of defendants in error, we present in this brief only so much of their testimony as relates to the *mental capacity* of said Waco Bruner, as that is the only controverted fact in the case. After proponents had presented the will for probate and presented the testimony of the subscribing witnesses thereto, the contestants put on their testimony, after which proponents then put on their rebutting testimony as to the matters involved.

The defendants in error examined on their behalf John A. Jacobs, Albert Stewart, Lucy Scott, Tom Sewell, Willie Cornell and Henry Kause; after which plaintiffs in error examined Lloyd Thomas, Hood and Weleetka Hardage, Dorsey and Emma Smith, Annie Stewart, G. W. McShann and E. Turner and read the depositions of Bilby and Meyers.

John A. Jacobs, says, in part as follows (page 44): "Were you well acquainted with him? (Meaning Waco Bruner.) Yes, sir. Do you know whether or not he was of sound mind? Yes, sir. * * * Was he of sound or unsound mind? A. *He was of sound*

mind.'' But this answer was corrected by amending the record after the appeal was taken as shown on page 89 of the record, where the answer is made to read: ''He was of unsound mind.'' This question is subject to an exception of plaintiffs in error as shown on page 44 of the record, and is the basis of another assignment of error herein. On pages 48 and 49 of the record Jacobs admits he has an interest in the case by purchase from an heir, Ben Reed. Albert Stewart is asked (page 51): ''Did you know what the condition of his mind was on or about the 18th day of March, 1911, two years ago? Yes, sir. What was it? It was not very good. * * * You say two years ago he was not of good mind? No, sir.'' In fact he had not said he was not of good mind at all. He said: ''It was not very good,'' which is a very different thing from saying ''he was not of good mind.''

On pages 52 and 53, Stewart is asked on cross examination: ''Well, on what do you base your opinion that he was not of sound mind? Well, he was a man that was more like a child or an old woman in place of a man—he was a man that roamed around over the county. He had no home of his own? No, sir. He had no wife? No, sir. He had no father? No, sir. He had no mother? No, sir. Or brothers or sisters did he? No, sir. And from that fact—from the fact that he had no home and just roamed

around as you say from one place to another and did not stay at one place, on that account is that the reason for you saying that? No, sir. What is the reason? He did not act as a man that had good sense. How did he act? Why, a man that had good sense he would go to work and try to make something for himself and try to make a living in a different way instead of doing the way he did. Isn't it a fact that about all the Indians in this country are of unsound mind? I don't know. They run around a good deal don't they, and not any of them tries to make anything for themselves do they? I don't know about others. Isn't it a fact that Waco Bruner had as much sense and had made as good as the average ordinary uneducated Indian? No, sir. Is not that true? No, sir. He knew where his property was didn't he? I guess so. And he looked after that himself didn't he? No, sir. Did he lease it? I don't know. Well, you don't know whether he looked after it himself or not do you? I don't know whether he looked after it himself or not. As far as you know he looked after his allotment himself did he? I don't know."

Thus, it will appear that this testimony of Albert Stewart has practically no probative force whatever. He simply says that the mind of Waco Bruner "was not very good." We could with perfect safety concede that his mind "was not very good,"

and still that would not be any reason whatever why this will should not have been probated. If every one had to have a high order of intellect or intelligence before the law would permit him to make a will, there would be but few people competent to make a will. Nothing further need be said to show that such testimony as that of Albert Stewart is not sufficient to justify the refusal to probate this will.

We next turn to the testimony of Lucy Scott or Lucy Stewart. After she is asked about his mind, etc., on page 54, she is asked: "Do you know what it was? Yes, sir. What was it? Weak mind." Respecting this matter, she is asked on cross examination, on page 46, "Isn't it a fact that you base your opinion on the fact that he was not well and had lost his voice that you say he was of unsound mind; and on other physical conditions besides; isn't it a fact that you base your opinion on these statements of facts? No, sir. Well, do you say he was not of sound mind? Well, he was not or he would have had a home or had a wife, he did not have any home or wife. You say he was not of sound mind because he did not have a wife or home? Well, he was not well and when he was well he never did try to marry."

Here this old aunt goes on record as saying that Waco had a "weak mind," practically because he

had no home and never married; yet he knew his relatives, attended to his business, leased his lands, etc. She and her brother Albert Stewart are two of the contestants, and, therefore, interested in the result of the case. Such testimony is so superficial that it, of course, has no probative force whatever and should not be considered. Their next witness is Tom Sewell. On page 58 he is asked about Waco's mind, and answered: "He was a kind of a whispering you know, and he kinder looked like he did not have the mind that people ought to have, used language, and like the rest of them he did not have quiet way, he had good sense but did not use it the right way."

Here they have again proven that Waco "had good sense;" but it is the opinion of the witness that "he did not use it the right way." This seemed to be Waco's undoing in the judgment of Tom Sewell, and fitted him for a competent witness in the estimation of defendants in error.

On cross examination (page 59), he was asked: "Isn't it a fact on that account of his whispering and on account of being weak physically and had this sore shank, as you call it, that you say his mind was not very strong? Yes, sir." Here counsel for proponents moved to strike out all the evidence of this witness on the question of mental condition of

the testator two years ago. But the court reserved his ruling until the close of the testimony of the witness when it struck out all of it which related to his mental condition as asked in said motion. Here this witness on that branch is discredited and the contest impaired; for the witnes did say that Waco had good sense but made bad use of it, etc.

Willie Cornell is next produced by contestants. He is one of the contestants and produced as a witness to establish that Waco Bruner did not have mental capacity to make a will. On page 61 he is asked: "In your opinion, two years ago was he of sound or unsound mind? (Objections, etc., here were interposed.) Well, he never was real sensible man. By Mr. Skinner: Answer the question. Was he of sound or unsound mind? * * * It was not real sound. Mr. Skinner: That is all."

Here again there is a total lack of proof of mental incapacity to make that will. Here twice did they try to drive it out of this witness that Waco Bruner was of unsound mind when he made the will; but they signally failed both times. Simply because a person "never was real sensible man," does not incapacitate him from making a valid will.

On cross examination, this witness is asked: "He had good sense didn't he Willie? Not much. He had sense enough to come in out of the rain didn't

he? Of course, yes, sir. Knew where his own land was did he? Yes, sir. And rented his own land did he? I expect so; I don't know whether he did or not. Isn't it a fact that he was just about as smart as the ordinary full-blood uneducated Indian? No, sir, he was not. When you say he was not of sound mind, isn't it true that you mean that he was not as smart as some of the other Indians in the country, but that he was not crazy was he? I could not call it crazy, I don't know what you would call it. Sometimes I called it idiot, I don't know what I would call it. He handled all of his own affairs? I guess he did, he did not have much to handle. He had a hundred and sixty acres of land didn't he? Yes, sir. Whatever handling was done he did it didn't he? I expect he did. Did he ever stay at your house? No, sir. He went there sometimes didn't he? He was there, did not stay there. Is he a relative of yours? Yes, sir, first cousin. Are you one of the contestants in this case? Yes, sir. Unless this will is broken you will not get anything will you? (Here were objections by contestants, sustained and excepted to.) That is all" (pages 62 and 63).

This cross examination of this witness reveals but little, indeed, on which to predicate the notion that Waco Bruner did not have testamentary capacity, at the time he made this will; but it discloses a willingness on the part of this witness to go as far

as he could possibly in that direction so as to get his property. But little credence can be put in such witness or testimony.

Henry Kause is produced by contestants as a witness, and after stating how long he had known Waco Bruner, he is asked, on page 63: "I will ask you in your opinion was he two years ago a man of sound or unsound mind? By Mr. Moffett: Objeced to as incompetent, irrelevant and immaterial. By the Court: Objection overruled. By Mr. Moffett: Plaintiff excepts. By Mr. Skinner: In your opinion, say two years ago, was he of sound or unsound mind? No, sir, he did not have good sense. Did he ever have good sense, since you knew him? No, sir. By Mr. Skinner: That is all."

It was, and still is, the province of the court exclusively—and not the w i t n e s s—to determine whether or not Waco Bruner had, or did not have, a sound mind, at the time of making this will. This was the very fact to be determined in this controversy; and as a matter of course it could not be settled by a witness, and when thus asked to do so, such a question was improper and incompetent for such purposes, and the objection ought to have been sustained. But it was overruled, to which plaintiff excepted, and the witness was thus allowed to say: "No, sir, he did not have good sense." This is nothing

but a direct conclusion of the witness, and nothing more. But, if we accept it in its full force and effect, it proves nothing whatever except that Waco "did not have good sense." This, by no manner of means, shows that Waco did not have sense enough to make a valid will. It has scarcely any probative value whatever. If it was only the wiseacres who could make a valid will, the rest of us poor mortals would be at a great discount, in the affairs of life. But, it has never yet been fully adjudicated that simply because some individual should conclude that a person did not have good sense that he, for that reason, could not make a valid will. Such testimony is too trivial and insignificant to be of any probative force or value when standing alone; and in this case it is alone, or at least it is alone with other evidence to the same effect and almost the same language. This is the last witness of the contestants on this branch of the case, and with whose testimony, contestants rest (page 64). The cross examination shows nothing stronger, and is as follows: "He wasn't crazy, was he? No, sir. He knew enough to get around and look after himself did he? I don't think he did, no. All the looking he got was what he did himself was it? The people around there helped him a right smart. I used to give him some stuff to wear and shoes to wear. He looked after his land and rented it didn't he? I don't think he did. You don't know

whether he did or not? I know he did not when I was with him. You mean that he was not as smart as some other Indians and did not try to locate? No, sir. By Mr. Moffett: That is all."

Excepting the deposition of Paul Ross, on page 83, which relates alone to another will which he says was made to Mr. Bilby by Waco Bruner in October, 1910, the above quotations are all, or practically all, the evidence adduced in this case by contestants as to the mental capacity of Waco Bruner; and we believe there is not one line of such testimony, even if it stood wholly uncontradicted, that justifies, or will sustain, a judgment in this case refusing the probation of this will. In other words, we believe there is no competent evidence whatever in this case which sustains the judgment herein rendered whereby said will was refused probation.

To recapitulate the evidence: John Jacobs says Waco was of "unsound mind"; Albert Stewart says, "It was not very good"; Lucy Scott or Stewart says he has a "weak mind"; Tom Sewell said, "He had good sense but did not use it the right way"; Willie Cornell said: "Well, never was real sensible man"; and when asked as to his mind, said: "It was not real sound"; and Henry Kause, when asked whether he had sound or unsound mind, said: "No, sir; he did not have good sense." Here you have it, with Jacobs

saying Waco was of "unsound mind"; and Sewell saying he "had good sense but did not use it the right way", which was directly in favor of the proponents and for the probation of the will; as against the opinion of Lucy Scott that he had a "weak mind"; and of Albert Stewart that his mind "was not very good"; and that of Willie Cornell that Waco "never was real sensible man," and his mind "was not real sound"; and that of Henry Kause, that "he did not have good sense." None of these expressions were competent evidence in the case, because they are nothing but conclusions of the witnesses, and should not have been permitted as evidence in the case. But if we were to accept them for all they are worth and for their face value; still, they do not prove that at the time of making that will, or at any other time, Waco Bruner did not have testamentary capacity. The burden of proof was on the contestants to show that he did not have such a capacity, after the proponents had presented the testimony of the subscribing witnesses to the will to the effect that he had mental capacity to make it, as was amply done in this case. Then again, they admitted, on the close of all this testimony, that said proponents still had made out a *prima facie* case for its probation, and that "the burden was upon the contestants to show that the testator had not sufficient mental capacity to make a will, * * * and that

if the contestants did not show this by a preponderance of the evidence, the contestants conceded that they were not entitled to prevail on the two questions submitted to the jury" (page 85). Where is the evidence overcoming that "burden"; and especially where is the "*preponderance of the evidence*" of such fact? It is not to be found in the *record* of this case; and we cannot look for it *outside* of the case.

In opposition to what these witnesses say as to the mental condition of Waco Bruner is the testimony of L. S. Fawcett, who is the U. S. Commissioner, who was called in to approve, and did approve, the will, of H. B. Moffett, the attorney to whom he went to draw up the will, and who, before he would draw it made a special investigation of his mental condition, his purpose of so doing, and the particular way in which he desired his will made; of James A. Long, a reputable lawyer of the bar who was averse to witnessing the will and so stated, but who, after taking the testator to one side and conversing with him privately and ascertaining his condition and purpose of the will, signed the will as a witness thereto; and of J. R. Dutton, the druggist, who was called in to witness the will, and was told by the testator what it was and requested him to witness it as and for his will.

Here the court will bear in mind that this desolate Indian, Waco Bruner, came to Holdenville alone, and unassisted by anyone, and in company with no one went into the law offices of Moffett and Fawcett for the purpose of having his will drawn, and there, while still alone and unaided by any one, told these four strangers what he wanted, and how he wanted his property disposed of, and the o b j e c t s of his bounty. They were all strangers to him, and he to them; but he had mental capacity enough to find his way to that office unaided, and still unaided to tell them what he wanted done and how and why he wanted it so done. They testify to his mental condition on that day, to-wit, the 18th of March, 1911, when the will was drawn, witnessed by Long and Dutton, and approved by the U. S. Commissioner. It was a very extraordinary occurrence, indeed, that this Indian should have appeared for the purpose of making his will before such highly intelligent and disinterested men as Moffett, Long, Fawcett and Dutton, and there, in their presence, not only execute his will, but to tell all these strangers why he wanted to make his will in the particular way narrated by them in their testimony in this case. If Waco Bruner was in any way mentally deranged, demented or incapacitated, it is remarkable, indeed, that none of these gentlemen detected it in the least; but after privately examining and talking with him, some of them for an hour

or more, they participated in the legal execution of that will, and now go on record as saying he was mentally capable of making it. The testimony of such men is not, under such circumstances, to be lightly considered. They had no motive whatever to deviate a line from the truth or facts in the case. They were brought together, at the instance and request of the decedent, for the very purpose of making this will, without any pre-arrangement or notice and after satisfying themselves of his mental condition, they yielded to his request to aid him to make his will which was written and prepared by Mr. Moffett as he directed. Not only is his mental capacity shown by these men, but after contestants had rested, the proponents presented the testimony of such men as Lloyd Thomas, L. J. Meyers, G. W. McShann, Dorsey Smith, Ed. Turner and others who had no personal interest in the case whatever, while on the other hand, all the witnesses of the contestants except Tom Sewell and Henry Kause were relatives and contestants themselves, and were directly interested in the outcome of the proceedings.

Lloyd Thomas was the deputy clerk of the court, and for years he and also Meyers had been deputy sheriffs of the county—men of the highest standard, morally, socially and intellectually. Thomas and McShann were, or had been, merchants for many years; and for many years had dealt with Waco

Bruner and sold him merchandise without, it would seem, ever having suspected he was mentally incapable of transacting business. Mr. Bilby testifies to his mental capacity—that he leased his lands from him for $50.00 a year, with only about twenty-five or thirty acres in cultivation; that he often employed Waco to interpret for him at the store; and that he was diplomatic and was able to adjust difficulties among and with the Indians and had great influence over them in such matters. In these things, Mr. Bilby is confirmed and corroborated by the testimony of Mr. Meyers, who used to clerk for him in his store, and speaks of these matters in his deposition.

On page 65, Mr. Thomas was asked: "How long did you know him? Ever since I have been here, perhaps about 15 years. What business were you in when you first came here? General merchandise business. Well, in the general merchandise business, did you see Waco Bruner frequently? Yes, sir, he came in the store frequently. Would he transact business with you there? Yes, sir. State whether or not you had seen him off and on up until the time of his death? I had. I will ask you, Mr. Thomas, in your opinion was he of sound or unsound mind? (Here contestants object on the ground that such matters were matters in chief, etc.; but the court overruled them, and the witness answered.) His mind was the same in my opinion that it always had been when I

knew him formerly. Just state in your opinion was he of sound or unsound mind? I would consider it sound, is my opinion."

On page 77, Annie Stewart was asked: "In your opinion, Annie, was Waco Bruner of sound or unsound mind? He could not talk good. I know, but was his mind sound or unsound? It seemed all right to me when he talked to me."

On cross examination she said: "You say you knew him about ten years? Yes, sir. I will ask you to state what time you knew him if he did not roam around from place to place? Yes, sir. * * * He had no home? No, sir. But just considered a weak minded sick Indian? Yes. sir."

That every aspect of their depositions, respecting the mental condition of Waco Bruner, his surroundings and the reasons why he desired to make his will to N. V. Bilby, and not to his relatives, may fully appear to the court, we hereby refer to the subscribing witness to the will, Commissioner Fawcett, and to the testimony of Dorsey Smith, Emma Smith, G. W. McShann, Ed Turner and L. J. Meyers found in the record.

In rebuttal to this evidence of proponents, the contestants took no proof other than the statement of Paul Ross, as to a will made in October, 1910, as before stated, which, in my judgment, proved nothing

against the mental capacity of Waco Bruner; but, on the contrary, such testimony of said Ross shows that, long before the present will was made on the 11th day of March, 1911, it was the fixed purpose and desire of Waco Bruner to leave his property to N. V. Bilby in preference to his own relatives. Just why the contestants persisted in showing this fact, is not apparent; for it conclusively shows that, at least from October, 1910, to the 11th of March, 1911, it was the fixed determination and purpose of Waco Bruner to leave his property by will to Mr. Bilby; and the pitiful story he told Dorsey Smith on Saturday before he died on Wednesday or Thursday, is further conclusive evidence that this was still his fixed intention up to almost the very hour of his death.

The evidence in this case conclusively shows that Waco Bruner had no near relatives, such as father, mother, wife, children or brothers and sisters; that he for many years was afflicted with a partial destruction of the vocal organs and had to talk in a whisper; that he had no fixed home of his own, but lived the most of the time at Party Beavers', a clansman, but no blood relation; that he was often in need of food and clothing and medicine, and the same was furnished to him—not by his relatives, no, not by them—but by an absolute stranger, N. V. Bilby, to whom alone he could go for such favors. When, on Saturday before he died, Dorsey Smith and wife went

over to Party Beavers to see him, they found him lying there on a cot, sick and without aid, care or medicine, and Dorsey administered to his needs the best he could, applied some medicine which he had with him to his sores with which he was badly afflicted. He then enquired for Mr. Bilby and requested them to have him come over to see him—that he needed medicine—but they did not tell Mr. Bilby, for, it seems he was not at home and they did not return by his home. As to when Dorsey found him in this destitute condition, he was asked: "Tell the jury what he told you? He told me—I asked him what was the reason he did not stay with his people and he said it was because his people did not care anything for him and he willed his stuff to Mr. Bilby—Mr. Bilby taken care of him, got him medicine and his people did not want to see him around. I gave him some medicine, he said he wanted to go some place to get some medicine. Did he in that conversation say anything to you about what the future action of his relatives might be in regard to this will? He told me they would not take care of him and did not want them to reap his stuff after he died."

This same pitiful story thus told to Dorsey Smith about his relatives not wanting him about, was told to Moffett, Long and Fawcett when he went to them to make his will, as may be seen from their depositions. Yet, no sooner was his will presented for pro-

bate than these relatives who would not have him about them but left him to die in the home of a stranger—Tom Sewell—presented their protest to its probation, and thereby sought to obtain his property. A jury passes on the two questions of fact, namely, Was he of sufficient mental capacity at the time he made the will to execute it? *second,* did Bilby unduly influence him to make the will? They found both questions against the will; but, as before said, the charge of undue influence was so wholly unfounded and the evidence on that feature so absolutely destitute of such proof, that the court refused to recognize it or be bound by it, but set it aside. And we respectfully submit that there is no evidence whatever which shows that, at the time he made his will, Waco Bruner did not have testamentary capacity, and this finding of the jury should also have been ignored by the court, and the will probated. But the fact that this jury would find against the will on the ground of undue influence, when there was absolutely nothing whatever to support it, shows conclusively that the finding of the jury on the mental incapacity is also unworthy of any serious consideration whatever.

Waco Bruner did not want his relatives to have his lands; but did want them to go to the man who had befriended him in his desolate and distressing condition, and at times when they refused him shelter, food or raiment. They saw him in want and dis-

tress; but administered not to his needs. He was homeless, childless and sick unto death; yet they gave him no comfort, solace or care. They left him to die among strangers who administered to his simple wants; and as soon as they learned he was dead, they come into court to stultify themselves by trying to prove he did not have sense enough to make a will. It would seem that they did not think of this when he was living, and if in that mental condition, most surely needed their closest care and attention. But the evidence in this case shows it was not true; but the fact that they are now before this court trying to show the simplemindness of their own relation in order to get what he had, when the evidence even of themselves shows they did not care for him when living, is enough to mantle their cheeks with the blush of shame if they had human sensibility enough about them to know the effects of disgraceful conduct. But they are Indians, and too much should not be expected of them; and for the same reason, too much faith should not be relied upon as to what they are willing to swear to get the lands. One who is so dead to all human kindness and to the agonizing tortures of want, privation and pangs of sickness and distress, is not at all likely to be any more concerned in his oath, or the correct methods resorted to in such matters whereby he was expecting to be the gainer.

If Waco Bruner did not possess mental capacity sufficient to make a will, it would look strange, indeed, that he would live forty-five years in one neighborhood and not a human being could be found who was willing to go on the stand and swear to his mental incapacity. No one did swear that he was not capable of making a will; not even the contestants themselves. The evidence in the record shows that for years he had traded for himself and s h i f t e d around without the aid of his relatives; that he leased his own lands and received his own rents from it. Not only this, but when he came to settling his business affairs, he seems to have had mind and forethought enough to realize that he was not going to live very long, and then set about to make a final disposition of his property in the way and manner he desired it to go after he was dead, and gave specific reasons why he wanted it to go that way. Unaided and alone, he came to Holdenville on the 11th of March, 1911, for the express purpose of making his will. He found his way to Mr. Moffett's office, and, although Mr. Moffett was an entire stranger to him, he entered into a full disclosure of the object of his coming there, telling him all about his business, how he wanted to dispose of his property, what property he had, the names of his relatives to whom he left small sums, and why he wanted to make that kind of a disposition of his estate. Such are not the actions of a per-

son who is mentally incompetent to make a will; but such are the highest evidences of ample and abundant mentality and ability to make and properly execute a will that would stand the test in any court. Why did he tell Moffett, Long, Fawcett and Dutton, at the time of so making this will, that Mr. Bilby had been kind and good to him and had furnished him food and clothing, and when sick that he had furnished him medicine, if such things were not true? If they were not true, why did not contestants prove this on the trial? Why, on Saturday before he died, did he tell Dorsey Smith the same thing, and that he did not want his relations to have his "stuff" and that they did not want him about them, if such things were not true and he was mentally incompetent? All these things are before the court; and arise from the record itself. An effort was made to show that Mr. Bilby persuaded him to make the will and had been keeping him around there for that purpose; but that theory was so weak and wholly unsupported that the trial court refused to countenance it, although this jury had no more trouble to find that fact to be true than it had the other; and in fact had about as much evidence of this as they had of his incapacity.

Instead of the evidence showing that this will was procured by the undue influence of Mr. Bilby, it conclusively shows that he was so little concerned about it that he had advised Waco when he mentioned

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the matter to him that as he was a full-blood he could not make a will; and that when he did come to Holdenville in March, 1911, for that purpose, Bilby did not come along or pay any attention to it—was neither present nor in the town and did not know he had made the will until so informed by Mr. Moffett long afterward, etc.

The trial court adhered to the conclusion that Waco had not mental capacity to make the will; but it did not have the evidence written out before it, as we have in this record, and doubtless did not fully understand it, for we believe there is not a sentence in the whole testimony that will bear out the judgment. It does not take the highest order of intellect to make a will. In fact, one may be badly off in many respects and still have mental capacity sufficient to make a valid will, and such will be entitled to probate. To say that Waco Bruner did not have that capacity is going far beyond any decision I have yet seen. In fact, many of the decisions go to the greatest length to uphold a will, and thereby carry out the intentions of the testator. The law provides for the disposition of property by will, and favors the settlement of estate by this method; and instead of seizing onto the most frivolous pretext to destroy the will, courts of the highest respectability have gone to what might be considered the other extreme to uphold them. Then, what degree of mentality is necessary to sustain a

will? On this, different courts have held differently, varying in degrees of intelligence; but where the testator knew the objects of his bounty, recollected his property and what disposition he desired to make of it, had managed his own affairs himself and supported himself generally by whatever means or methods, etc., all courts uphold his will so far as mental capacity may be involved. In fact, the law itself presumes a testator sane, rational and mentally capable of disposing of his property as he may see proper, and was so held by the Supreme Court of Oklahoma in *Campbell v. Prophet*, 153 Pac. 839, heretoforec cited. Aside from a mere formal matter in the probation of wills of showing by the subscribing witnesses that he was of sound mind, the b u r d e n rests upon him who charges mental incapacity, unless he had been previously adjudged insane or incompetent. Sections 86 to 90 inclusive of Underhill on the Law of Wills, heretofore given, so completely, concisely and forcibly presents the law as to the mental capacity required to make a will, that we here again refer the court specifically to them.

Under the law applicable to this feature of the case and the testimony herein given, it seems to me that there remains but little doubt of the mental capacity of Waco Bruner to make and duly execute this will in controversy. As this author shows, the fact that he was afflicted with paralysis of the vocal or-

gans, so he had to talk in a whisper; that he was careless in habits and indifferent as to his estate; that he had no *wife* or *home*, but lived among his clansmen because his people did not want him about them, I take it, is not sufficient to show he did not have testamentary capacity on the 18th day of March, 1911, when he made that will. But, on the contrary, I submit that the evidence in the case shows conclusively that, according to the law which must govern this case, Waco Bruner, on said date and at all times, had mental capacity fully and amply sufficient to make a testamentary disposition of his property; and that this will was denied probation without any legal or valid excuse or grounds upon which it can judicially rest.

We, therefore, submit that under the law which governs this case the evidence of the contestants herein adduced was not competent or sufficient to show or establish that at the time of the execution of his will, Waco Bruner was not competent to make the will; but that the evidence herein does show conclusively that he then had testamentary capacity and that the judgment in the case of the District Court is not sustained by the evidence but is contrary to the evidence and should be reversed. As before stated the County Court found, and so held, that he had testamentary capacity and that the will was regular in form, and properly executed.

The plea may herein be advanced that the court should invoke the rule that where the evidence is conflicting and reasonably tends to support the verdict or judgment, the case should not be reversed.

If so, or whether so or not, we answer that this is not a case of that kind. A trial of right to the jury could not be invoked in this case, but the verdict, at most, was simply advisory, if at all proper in such cases, as shown by the decision of the state Supreme Court in this case and other decisions therein cited. Again, as to the mental capacity of Waco Bruner, or at the least that degree of mental capacity which the law requires a testator to possess in order to make a valid will, there was no conflict in the evidence taken in the case. We might concede with perfect safety that Waco Bruner did not have good sense; that he had a weak mind; that his mind was not real sound, as contestants tried to show in this case; but still, the law would probate this will, for we believe the evidence shows he had testamentary capacity and gave the scrivener all the details by which he was to write the will, remembering and giving all such details as the law requires in such cases. He told these strangers the history of his life when he went into their office for the express purpose of making the will; that he had no near relatives on whom to bestow his property; that the relatives he had did not want him about them, and cared nothing for him. He repeated this

pitiful story to Dorsey Smith on Saturday before he died on Wednesday while lying there on a cot at the home of Party Beavers—told Dorsey that he did not want them to have his stuff when he was dead; and that he wanted Mr. Bilby to have it—that he had helped him in the hour of need, and when needed, with food, clothes and medicine. He knew that death was near—that he could not live long—and prepared for it and for the disposition of his property; and, Indian-like, when the thread of life was waning away, he remembered those who had befriended, and those who had shunned and forsaken him, in the hour of greatest need; and he s o u g h t to reward his only friend for the kindness he had done, by leaving him what little he had in the form of this will. No one disputed this; no one denied it. And notwithstanding the fact that Waco had told these different strangers of the actions of his relatives toward him—that they did not want him about them, etc., still, no effort whatever is taken by them to show it was false, or any aid they had ever rendered him; but when the trouble of his life is over and his obnoxious presence is no longer to be seen, these scorning relatives rush into court to break the will, and, in order to accomplish their disreputable undertaking, go upon the stand in their own behalf because no one else would do so, and there attempt to make it appear that their own relative by blood did not have sense enough to

make a will, although he did have sense enough to attend to his own affairs of life, and did so while living. The County Court refused to believe this story or grant them any relief on this ground. They got their relief in the District Court on practically the same, and in part the same, evidence adduced in the County Court, and which we submit that, under the law of this case is not sufficient evidence of mental incompetency and this judgment is not sustained by competent evidence.

As to the incapacity of Waco Bruner to make his will, no one testifies in this case other than the contestants and heirs except Jacobs, Kause and Sewell. Sewell's testimony was really in favor of the will, but the court threw it out. Jacobs admits he is a distant relative of the deceased; and on pages 48 and 49, admits his interest in the case, and says he has a contract with Ben Reed, one of the contestants, "to buy his interest," in case this will is broken. This makes Jacobs practically a contestant of the will. This leaves no one on behalf of contestants on this point but Kause who is not materially interested in breaking the will. Kause says: "He did not have good sense." We might admit that what Kause said was absolutely true; and still they would not have evidence to show testamentary incapacity, according to the authority and decisions herein cited on that subject. The significance of this condition is pointed

out and considered by Justice MATTHEWS in this case of *Campbell* v. *Prophet*, above cited, wherein it is observed:

> "None but relatives gave testimony in their behalf, while there was a large number of witnesses who testified for appellant as to the soundness of decedent's mind at the time she executed the will; among these witnesses being two physicians, one of whom was her attending physician, and neither of whom, as far as the record shows, had any interest in the result of the trial."

In the case at bar, as in the above cited case, a great many witnesses who were strangers to Waco Bruner testified for proponents and stated that he was of sound mind. Among these witnesses were Mr. Moffett who drew the will from the information and directions alone given him by the decedent whom he had never known before. L. S. Fawcett, the United States Commissioner whose sworn obligation of office made it his duty to know he was of sound mind before he approved the will. Then, the subscribing witnesses to the will, James A. Long, an attorney at law, and J. R. Dutton, the druggist—all of whom say he was of sound mind or had testamentary capacity at the time of making his will.

There is another thing in this case which should challenge the attention of the court: Not a single act or demonstration of Waco Bruner, indicative of in-

sanity or mental incapacity to make a will, is mentioned or referred to by contestants or their witnesses other than simply that he was indolent, improvident, had no home of his own, and never married. It is a little singular, indeed, that Waco Bruner lived in the community for forty-five years, and no one other than the contestants had discovered that he was insane and did not have testamentary capacity to dispose of his property, although he had sense enough to attend to his own business and manage his own affairs among which was the control and leasing of his allotment of one hundred and sixty acres which he had leased for years for $50.00 a year although only twenty-five or thirty acres were in cultivation. It is pointed out in the opinion in this case that ordinarily all the law requires, to be able to dispose of one's property, is that testator have the capacity to attend to his own affairs and transact his own business, to know the objects of his bounty, to remember his heirs who would otherwise get his property, and be able to direct how he wants his will executed. Some of the authorities herein cited, especially those in this note of Mr. Bigelow, that in determining the capacity of the testator, the court is at liberty to examine the will itself; and if regular and in due form and intelligent, etc., such as a sensible man would make, that that is evidence of his sanity and mental competency to make it. The will in this case is in

fact a very sensible will and makes an intelligent disposition of his property. He gave Mr. Moffett the reasons why he wanted to make it in this way and why he wanted to give the lands to Mr. Bilby. He also explained these same reasons to the subscribing witnesses and to the United States Commissioner Fawcett when he appeared before him to have it approved by said Commissioner. Waco Bruner could not have done all these things there alone with no one to help or suggest them to him, if he had been insane or did not have testamentary capacity to make this will. Here is the direct evidence and practical demonstration of Waco Bruner that he had testamentary capacity when he made that will; and did make it with all the information given by him, necessary to a valid will and sensible disposition of his property. He not only knew and remembered the objects of his bounty, but he knew his heirs, and remembered their discourteous and unfriendly treatment toward him through life and in his last sickness, and for which reasons he did not want them to have his property when he was gone; but wanted it to go to the one who had befriended him and cared for him in his distress when forsaken by his own relations who are now trying to break this will.

Another fact fully and conclusively established in the case would seem, indeed, to lead to the irresistible conclusion that, at the time this will was ex-

ecuted, or at any time during the life of Waco Bruner, he had testamentary capacity. He was a full-blood Creek Indian and forty-five years of age. The evidence adduced fully establishes the fact that he had learned the English language to that degree of perfection that he could speak, understand and converse and transact business in that language with others who s p o k e it and could not understand his own tongue; and that at the time he went to the office of Mr. Moffett to have his will drawn, he, in the English language and without the aid of an interpreter (for he was alone), gave Mr. Moffett all the details and information from which he wrote that will as the same now appears in this record. Not only that, but he detailed in the English language to the scrivener, the attesting witnesses and to the United States Commissioner the personal reasons why he wanted his will made in that particular manner, and why he did not want his own relatives to have his property; and so proficient was he in speaking and expressing himself in the English language that these persons easily understood him and what he wanted and were able from this to testify to these facts as shown in this case. There is nothing in this record to show that Waco Bruner was ever declared insane; or ever did any insane act from which insanity could be inferred. The most that could be said of him was that he was indolent, indifferent and improvident, and did

not, perhaps, possess as high a degree of intellect or intelligence as some other people. But the evidence is conclusive that he did have sense, intelligence and shrewdness enough to learn the English language, although a full-blood Indian and brought up under the tongue, usages and customs of his tribe. And to say that he actually did possess this degree of intellect and a b i l i t y sufficient to accomplish all these things, and to admit that because of his ability to do so, he gave to the scrivener who wrote his will all these details and describing his lands and giving his property and directing how and to whom it should go and why he desired to make the will in that particular manner, then, to undertake to deny that having thus given the specific directions how to make the will, he still did not then possess testamentary capacity to make that will, would look, indeed, to be self-contradictory; and self-destructive of any such contention.

We close this last proposition under this assignment with the candid belief and conviction that there is not sufficient evidence in this case to establish testamentary incapacity, under the law, at the time of making this will, and that this case even on this ground alone should be reversed.

Third Assignment of Error.

This assignment is as follows:

That said Supreme Court erred in affirming said judgment of said District Court and thereby denied the probation of said will, and in so doing affirmed the action and ruling of said District Court in permitting the witness, John A. Jacobs, to testify that said Waco Bruner was of unsound mind, over the objections and exceptions of the plaintiffs in error, as shown by the record herein; and in holding in this cause that under the evidence adduced in the case, the question of the testamentary capacity of Waco Bruner was one of fact and reasonably supported by the evidence, whereas under such evidence, the sufficiency thereof to establish testamentary incapacity, was a proposition of law arising under said Acts of Congress, and which evidence is wholly insufficient in law to establish such testamentary incapacity or to overcome the presumption of law that said Waco Bruner was of sound mind and possessed testamentary capacity at the time of making said will.

All these matters except that pertaining to the objections and exceptions to the testimony of said Jacobs, have already been gone into heretofore and need no further attention here. At page 45 of the record, it will be seen that Jacobs was asked by de-

fendants in error "was he of sound or unsound mind"; and answered: "He was of sound mind," which was afterward corrected in the record on page 89 so as to read: "He was of unsound mind." Just preceding this question there is the objection of plaintiffs in error which seems to have gotten in before the question in this record. But it there appears that the objection was made, overruled by the court and duly excepted to, as leading. Whether this objection be applied to this question or the one which preceded it, both are leading and pertain to the mental condition of the testator and whether he was, or was not, of sound mind. This, of course, was the very thing the court had to determine for itself, and should have determined it from the evidence in the case—not to take the individual opinion of some witness on the point. Jacobs is the only witness for defendants in error who testified that Waco Bruner was "of unsound mind." But this is simply his conclusion and not competent evidence in the case, and this statement of that witness is here objected to in this court and the objections and exceptions of the plaintiffs in error are also insisted upon by them and presented, as thus saved in said record and assignment. We still insist that the same was not proper and the trial court erred in permitting said witness to make such a statement or give such a conclusion on the very point involved in this case, and which is the only mat-

ter of fact now before this court in the case. From pages 15 and 61 of the record, it will be seen that plaintiffs in error insisted upon this and all errors of law shown by the record in the case, for a judgment and new trial before the trial court; and then again before the Supreme Court of the state on appeal (page 88) where it is made the sixth assignment of error under the provisions of the statute for such errors.

Fourth Assignment of Error.

This assignment is to the effect that, by said decisions of the state courts, the plaintiffs in error were denied all their right, title, interest and estate in and to the property mentioned and devised in said will, and the right to have said will probated, if proper and necessary, contrary to the provisions of said acts and the 14th Amendment of the Constitution of the United States wherein it provides that no state shall deprive any person of life, liberty or property without due process of law.

This court has held in effect that a personal judgment without personal service, is not due process of law, *Pennoyer* v. *Neff*, 24 L. ed. 566; that a judgment against a party denied the right of defense is not due process of law, *Hovey* v. *Elliott*, 42 L. ed. 215; *Windsor* v. *McVeigh*, 23 L. ed. 914; and that a judgment

in a case outside the issues therein although parties are served, etc., is a nullity, and, therefore, not due process of law, *Reynolds* v. *Stockton*, 35 L. ed. 464; and it would seem only one step further to hold that a judgment even within the issues, but without any, or sufficient, evidence to support it, would also not be due process of law, as required in said amendment.

At pages 569 and 570 of Vol. 7 of Ency. of U. S. Supreme Court Reports, the statement is to be found that:

> " It is a well established rule that a court can consider only what is put in issue by the pleadings, and that a judgment or decree must be responsive to the issues tendered by the pleadings. It must conform to and be sustained by the allegations of the parties, *as well as by the proofs in the cause*, and cannot be founded upon facts not put in issue by the pleadings." (Italics are mine.)

The author cites a great many decisions of this court to sustain this text which may be found on page 570 of that volume.

It is the claim of the plaintiffs in error that these state judgments are not sustained by the "*proofs*" in this cause; and that they cannot be sustained under the law governing this case; but are contrary to both said Acts of Congress and said amendment.

Fifth Assignment of Error.

This assignment presents that said judgments of said District and Supreme Courts were erroneous because contrary to the facts found by the County Court which was the court of original jurisdiction in probate matters; and that the judgment of said County Court in refusing to probate said will because of said state statute was erroneous because said Acts of Congress governed such matters.

This state statute has since been construed by said Supreme Court in *Allen's Will,* 144 Pac. 1055, and there held that the phrase "prevented by law," used in said state statute, means prevented by the law of the state, and does not apply to Indians of the Five Civilized Tribes who are prevented by Act of Congress from alienating, or incumbering real property while living, otherwise than by last will and testament.

So this assignment needs no further consideration other than to show that the decision of the County Court was clearly erroneous in holding and refusing to probate that will simply because this state statute prohibited its execution and probation. But this court has the benefit of that court's judgment that at the time Waco Bruner executed that will, he possessed testamentary capacity and made the same of his own free will and accord, as therein expressed.

There is still one other little feature that runs through all these assignments unmentioned heretofore. It is provided in section 5274 of the Revised Laws of Oklahoma, 1910, that: "A void judgment may be vacated at any time, on motion of a party, or any person affected thereby."

The plaintiffs in error complied with the provisions of this statutory provision of said state by filing their motion before the District Court which rendered this judgment for a new trial, etc.; and again presented the same on the appeal to the Supreme Court of said state, embracing the same in the assignments of error in their petition in error filed in that court. But the trial court overruled e v e r y ground of said motion, and the action of the trial court was affirmed by said Supreme Court, whereupon they applied for a rehearing and was again denied relief in all matters involved in such appeal.

So if this court reaches the conclusion that said state courts had no jurisdiction in this case; and that their judgments were absolutely void, still there will remain the fact before it that the plaintiffs in error also made the motion to vacate said judgment as provided in said statute, and was finally denied any relief thereon, contrary to these Acts of Congress, etc.; and can get no further relief thereon except by this proceeding before this court.

With these few observations, we respectfully submit this brief for the indulgent consideration of this honorable court.

Respectfully submitted,

LEWIS C. LAWSON,
Counsel for Plaintiffs in Error.

February 10th, 1917.

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No. [redacted] (25[redacted]) 160

In the

Supreme Court of the United States.

October Term, 1916.

NICHOLAS V. BILBY and H. B. MOFFITT,
Plaintiffs in Error,

VERSUS

ALBERT STEWART, LUCY STEWART, WILLIE CORNELL, BEN REED, SAMPSON BUCK and NATHAN STEWART, - - *Defendants in Error.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

BRIEF OF DEFENDANTS IN ERROR.

GEORGE C. CRUMP,
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J. ROSS BAILEY,
Attorneys for Defendants in Error.

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In the

SUPREME COURT OF THE UNITED STATES.

October Term, 1916.

No. 476.

(25383)

NICHOLAS V. BILBY and H. B. MOFFITT,

Plaintiffs in Error,

vs.

ALBERT STEWART, LUCY STEWART, WILLIE CORNELL, BEN REED, SAMPSON BUCK and NATHAN STEWART, - - *Defendants in Error.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

BRIEF *of* DEFENDANTS *in* ERROR.

Statement of the Case.

This action involves 160 acres of land, the allotment of a full-blood Creek Indian named Waco Bruner, and comes here originally from Hughes

County, Oklahoma. On the 13th day of March, 1911, this full-blood Creek Indian was in the office of one H. B. Moffitt, a strange white man, of Holdenville, Oklahoma, and while there affixed his name to a paper which was afterwards filed in the County Court of Hughes County, Oklahoma, for probate, and was denominated a will. (Tr., pp. 5 and 6.) This instrument was filed in said County Court by plaintiffs in error and praying that the will be admitted to probate and letters testamentary issue. (Tr., p. 5.) By the terms of said instrument N. V. Bilby, a white man, became the sole beneficiary of the purported will and H. B. Moffitt, a total stranger to the deceased Indian, and the man who drew the will, was named as executor. Petition for probate of this will was filed in November, 1912, in the County Court of Hughes County, Oklahoma. Evidence was taken upon the issues joined, but said evidence is not shown by the transcript of record here, but on the 16th day of January, 1913, the County Judge of Hughes County, Oklahoma, made and entered an order denying said will to probate. (Tr., pp. 10 and 11.) An appeal was prosecuted from the County Court to the District Court, which is provided for by the laws and procedure of the state of Oklahoma, and said law further provides that in the District Court such action shall be tried *de novo*. (Harris-Day Code, section 5515.) On March 15, 1913, this cause was tried

again in the District Court of Hughes County, Oklahoma, and the jury was requested by plaintiffs in error to pass upon the questions of fact involved in said trial. The transcript of record does not show who made the request for a jury, neither does it disclose any objections to a jury trial by plaintiffs in error.

The cause was tried, the evidence heard and the court submitted to the jury two questions of fact for it to determine and the jury after hearing all the evidence returned into court two verdicts as follows, to-wit:

"*In re Estate of Waco Bruner, deceased.*

" Q. Did N. B. Bilby use undue influence in order to procure Waco Bruner to make the alleged will?

" A. Yes.

" (Signed) T. K. SANDERSON, *Foreman.*"

"*In re Estate of Waco Bruner, deceased.*

" Q. Did Waco Bruner at the time of the execution of the alleged will have a sound and disposing mind and mental capacity to execute it?

" A. No.

" (Signed) T. K. SANDERSON, *Foreman.*"

Under our laws of Oklahoma the trial court has a right to adopt these verdicts or reject them as

the court desires. The verdicts of the jury were only advisory to the court. When the motion for new trial was presented in the District Court by plaintiffs in error, the trial court who had heard all the evidence, entered an order, the effect of which was to sustain the motion of plaintiffs in error as to one of the verdicts returned by the jury: that is the trial judge held that the evidence was insufficient to warrant the court in finding as a fact that Bilby, the plaintiff in error, used undue influence in procuring the execution of the purported will; but the same court, at the same time, denied the motion of plaintiffs in error with respect to the other verdict returned by the jury, and said court expressly approved of said verdict, and adopted same as findings of fact by the court, which was to the effect that Waco Bruner was mentally incapable of making a will; that he did not have a sound and disposing mind. This finding of fact by the court, of course, was sufficient upon which to base a judgment denying said will to probate, and accordingly such judgment was entered on March 22, 1913, by the District Court of Hughes County, Oklahoma. The judgment of the District Court of Hughes County, Oklahoma, which was upon a trial *de novo,* denied said pretended will to probate solely upon one ground, to-wit: the mental incapacity of the Indian, Waco Bruner.

The validity of no federal or state statute was involved in the trial of this cause, and no statute, state or federal, was ignored or declared unconstitutional by either the District Court or the Supreme Court of the State of Oklahoma. (Tr., pp. 12 and 13.)

The case was within due time appealed from the District Court of Hughes County, Oklahoma, to the Supreme Court of the State of Oklahoma. Said cause was decided by the Supreme Court of the State of Oklahoma on December 21, 1915, and is reported in Vol. 153 Pac. Rep. p. 1173. Counsel for plaintiffs in error made no contention in the Supreme Court of the State of Oklahoma, that we are aware of, that the state courts were without jurisdiction to probate said purported will; neither did the decision of the Supreme Court touch upon any question of jurisdiction, nor upon the validity or invalidity of any statute, state or federal; and neither was any such question presented by the record. Every contention made by plaintiffs in error in the Supreme Court of the State of Oklahoma, was discussed and passed upon by said court and the opinion meets every issue. Plaintiffs in error, not only in the County Court, but in the District Court of Hughes County, and in the Supreme Court of the State of Oklahoma, demanded that said purported will be admitted to pro-

bate by the County Court of Hughes County, Oklahoma, and the last sentence of plaintiffs in error's exhaustive brief filed in the Supreme Court of the State of Oklahoma, in this cause, is as follows:

> " With this we respectfully submit this matter to this court, asking that this judgment be reversed and remanded with specific directions to the trial court to probate this instrument as the last will and testament of Waco Bruner, deceased.
>
> " LEWIS C. LAWSON,
>
> " *Counsel for Plaintiffs in Error.*
>
> "December 1, 1913."

(Page 121 of plaintiffs in error's brief in cause No. 5702, Supreme Court of the State of Oklahoma.)

Counsel for plaintiffs in error in presenting the case of plaintiffs in error in the Supreme Court of Oklahoma, contended—*First*, that the evidence was insufficient on the part of defendants in error to warrant the trial court in holding that Waco Bruner was incapable of making a will; and *Second*, that counsel for defendants in error, in the trial of the cause, while discussing with the court the matter of who should open and close the argument to the jury, made certain admissions, the effect of which was that plaintiffs in error in the trial of the cause had made out a *prima facie* case, and for this reason counsel

for plaintiffs in error insisted in the Supreme Court that he was entitled to have said will admitted to probate; and as we gather from his brief he still makes the same contention. Both matters were disposed of by the Supreme Court of the State of Oklahoma. (Tr., pp. 90, 91, 92, 93 and 94.)

BRIEF *and* ARGUMENT.

As we said heretofore, the question of jurisdiction, which is now raised by plaintiffs in error for the first time in this court, was not presented to the Supreme Court of the State of Oklahoma. There were but three contentions made by plaintiffs in error in the Supreme Court of the State of Oklahoma, to-wit:

First. Improper submission of the two questions of fact to the jury;

Second. Certain admissions alleged to have been made by counsel for defendants in error during the trial of said cause in the District Court;

Third. Insufficiency of the evidence upon which the judgment of the District Court of Hughes County, Oklahoma, was based.

And in disposing of these three contentions the Supreme Court of the State of Oklahoma uses the following language:

> " Aside from the question as to whether or not the trial court had a right to submit these two questions of fact to a jury, the proponents are not in position to complain here, for the reason that the record shows that no objections were

made to the action of the trial court in this respect, but that, as a matter of fact, it was done by the consent of the parties.

" It is next insisted that counsel for contestants made certain admissions, after the close of the testimony, that entitled the proponents to have the alleged will probated. The admissions were made while the court was considering the question as to who had the right to open and close the argument, and the substance of the admissions are: That the contestants conceded that the proponents had made out a *prima facie* case, and that unless the contestants had overcome this, by a preponderance of the evidence, that the will should be admitted to probate. We see nothing in this admission that deprives the contestants of the right to have the question of testamentary capacity determined, upon consideration of all the evidence. There is no merit in this contention.

" It is also insisted that the evidence is insufficient to support the finding of testamentary incapacity. The jury found, as above stated, that the alleged testator did not possess testamentary capacity. This finding was approved and adopted by the trial court, which had the effect of a finding of incapacity by the court, and we are called upon to say whether or not the evidence fairly and reasonably supports the finding. We think it does. The evidence upon the question of testamentary capacity is voluminous and sharply conflicting, and it would serve no useful purpose to set it out in detail. It is sufficient, how-

ever, to state that the deceased was a full-blood Creek Indian; he died seized and possessed of no property other than his allotted lands; he was a bachelor about 45 years old; his father and mother were dead; he left no brothers or sisters surviving him, and the contestants are his nearest relatives. Bilby had been in possession of his lands for several years prior to his death, paying a small rental therefor; the deceased had no home, but stayed with his relatives, friends and acquaintances, roaming from place to place; he was in bad health and had been for some time prior to his death, suffering with tuberculosis, and could not speak above a whisper; he spoke broken English, was uneducated, and knew practically nothing about the ordinary business affairs of life. From an examination of all the evidence, we are satisfied that the same fairly and reasonably supports the court's finding of testamentary incapacity." (Tr., p. 93.)

The second assignment of the plaintiffs in error is as follows:

"*Second Assignment.*

"This assignment, tersely expressed, involves three propositions: *First*, is the probation of a will of a full-blood Indian of the Five Civilized Tribes, executed as provided in the Acts of Congress of 1906 and 1908, necessary to its validity and to vest title to the property therein embraced, upon the death of such testator? *Second*, has the probate or other courts

of the State of Oklahoma, jurisdiction in such matters, or authority to require such wills probated and thereby subject to the laws of Oklahoma pertaining to the probation of wills of other citizens under its jurisdiction, and as in such laws provided? And, *Third,* even if such state courts had jurisdiction of such Indian matters, does the testimony taken in this case and found in the record, show or establish, as a matter of law or fact, that, at the time said will was executed, Waco Bruner did not possess testamentary capacity sufficient to make said will; and were the findings of such fact by the court and jury, and said judgments refusing to probate such will, sustained by the law and the evidence in this case?"

In answer to this proposition we maintain that there is no such federal question involved in this appeal as will give this court jurisdiction to pass upon the question raised in plaintiffs in error's brief. In support of this proposition we call the court's attention to the pleadings in the court below. The plaintiffs in error filed the following petition for the probate of the purported will of Waco Bruner, deceased, thereby invoking the *jurisdiction* of the County Court of Hughes County, Oklahoma, the court having probate jurisdiction in the State of Oklahoma, for the probation of wills, as follows, to-wit:

" PETITION FOR PROBATE OF WILL.

"*State of Oklahoma, Hughes County. In the County Court. In the Matter of the Estate of Waco Bruner, Deceased.*

" Comes now H. B. Moffit and shows to the court: That Waco Bruner departed this life at the residence of Thos. Sewell in Hughes Co., on or about the 21st day of November, 1912; that said decedent at the time of his death was a resident of Hughes County, State of Oklahoma, that said decedent left estate in the County of Hughes, State of Oklahoma, the general character and probable value of which is hereinafter stated; that said decedent left a will bearing date of about the 18th day of March, 1911, which petitioner alleges to be the last will and testament of said deceased, and which is herewith presented for probate; that H. B. Moffit the person named in said will as executor to act as such.

" That W. E. Templeman for whom letters testamentary are prayed herein is a resident of Hughes County, State of Oklahoma, his post-office address being Holdenville, Okla.

" That the names, ages and residence of the heirs and devisees of decedent so far as known to petitioner are as follows:

Name	Age	Residence P. O.
N. V. Bilby	42	Holdenville, Okla.
Albert Stewart	45	Holdenville, Okla.
Lucy Stewart	..	Holdenville, Okla.
Ben Reed	..	Holdenville, Okla.

The general character and probable value of said estate is as follows: Consists of the allotment of deceased, described as East Half (½) of Northeast Quarter (¼) of Section Seven (7) and the West Half (½) of Northwest Quarter (¼) of Section Eight (8), all in Township Six (6) North, Range Nine (9) East, of the probable value of $1000.00.

" Wherefore, petitioner prays that upon hearing hereof said will be admitted to probate and letters testamentary issue to said W. E. Templeman.

(Tr., pp. 4 and 5.) H. B. MOFFIT."

Thereupon the defendants filed in said court their protest against the probation of said purported will, which is in words and figures as follows, to-wit:

"*State of Oklahoma, County of Hughes*—ss. *In the County Court. In the Matter of the Estate of Waco Bruner, Deceased.—No. . . .*

" OBJECTIONS TO PROBATE OF PURPORTED WILL.

" Comes now Ben Reed who states that he is a nephew of Waco Bruner and that as such nephew he is an heir of the said Waco Bruner, and objects to the probate of the purported will filed in this case by N. V. Bilby and for reasons, says:

" *1.*

" That said Waco Bruner was a full-blood Indian, duly enrolled as such according to the

record of the Dawes Commission to the Five Civilized Tribes of the Indian Territory; that as such full-blood Indian he had no right to make the purported will which has been filed herein for probate; that said Waco Bruner was prohibited by statute from alienating, conveying or incumbering his real property while he was living, and under the law, he had no right to execute said will, and that said will is therefore void and a nullity.

"

2.

" The undersigned most respectfully represents and alleges that the purported will, which purports to have been executed on the 18th day of March, 1911, was not executed, attested and witnessed as by law required.

"

3.

" That the execution of said purported will filed herein for probate was procured by fraud practiced upon the said Waco Bruner by N. V. Bilby, and others working for the said N. V. Bilby, and in his behalf.

"

4.

" The undersigned further alleges that at the time of the execution of the alleged will, that undue influence was exercised over and upon the said Waco Bruner by the said N. V. Bilby, his agents and employees, and that by reason of the improper exercise of said influence and duress, the execution of said purported will was obtained.

"

5.

" The undersigned further aver that at the time of the execution of said alleged will filed herein for probate that the said Waco Bruner was not of sound mind; that he was incapable of properly appreciating the objects of his bounty; that he was weak minded, easily influenced and incapable of forming an intelligent conception of his property and the objects of his bounty.

"

6.

" Petitioner further states that he is of Indian blood and blood relation of the said Waco Bruner, and that said N. V. Bilby, the beneficiary of the purported will filed herein, is not of Indian blood, hails from the State of Nebraska and is of no relation, either by blood or marriage, to the said Waco Bruner, who is a full-blood Creek Indian, and that the purported gift purported to be bequeathed by said will is against nature and justice.

(Tr., pp. 7 and 8.) BEN REED."

And upon the filing of the above and foregoing protest against the probation of said purported will, the plaintiffs in error filed in the County Court their reply, which is in words and figures as follows, to-wit:

"*In the County Court of Hughes County, State of Oklahoma. No. 1556. In the Matters of the Estate of Waco Bruner, Deceased.*

" Comes now H. B. Moffit, proponent, Nich-

olas V. Bilby the beneficiary under the will and testament of said Waco Bruner, and for his answer to the contest of Ben Reed, Albert F. Stewart, Lucy Stewart, Willie Cornell, Simpson Buck and Nathan Stewart to the probation of said will and testament, denies each and every charge, statement and allegation made and contained in said written contests and each of them not hereinafter admitted.

" *Second.*

" Said Bilby hereby admits that said Waco Bruner was a full-blood Creek citizen and was so enrolled, and alleges that said decedent, at the time of his death, and at the time said will was made on the 18th day of March, 1911, had no wife, father, mother or children then living; nor had he any relatives of nearer kinship than those mentioned in said will at the time of making said will or at his death; and that on said respective dates, said Waco Bruner was then of lawful age and sound mind and memory.

" *Third.*

" Said Bilby specially denies that said will was not executed, attested and witnessed as by law required; that the same was procured by fraud practiced upon said decedent by said Bilby, or by any other person or persons, working for said Bilby and in his behalf; and denies that undue influence was exercised over and upon said decedent by said Bilby, his agents and employees: and denies that by reason—the improper exercise of said influence and duress, the ex-

ecution of said will was obtained; that he also denies that at the time of the execution of said will said decedent was not of sound mind, or was of weak mind and did not properly appreciate the objects of his bounty; or that he was easily influenced and incapable of forming any intelligent conception of his property and the objects of his bounty, each and all of which charges made in said respective contests said N. V. Bilby hereby emphatically denies, and states that the same are false and untrue and that at the time of making said will Waco Bruner was of sound mind and memory and fully capable of making said will, and that said decedent did make and execute said will without any undue fraud, menace or duress exercised upon him to induce him to make said will by said Bilby, his agents or employees or any one else for him or in his behalf or in his interest; and further states that said will was freely made and duly executed; and further states that said will was freely made and duly executed by said Waco Bruner without any undue influence, fraud, menace or duress practiced upon him therein by said Bilby or by anyone else for him or on his behalf.

" *Fourth.*

" Said Bilby further charges and avers that the statute of the state of Oklahoma relied upon by said contestants, and all statutes and laws therein mentioned, referred to and relied upon by said contestants, to defeat the execution and probation of said will and testament of said decedent are repugnant to, and in open violation

to an Act of Congress entitled 'An Act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes,' and especially section 23 of said act; also another Act of Congress entitled 'An Act for the removal of restrictions from part of the lands of allottees of the Five Civilized Tribes and for other purposes,' and especially section eight thereof; and that the same are also repugnant to and in violation of another Act of Congress entitled, 'An Act to ratify and confirm an agreement with the Muskogee or Creek Tribe of Indians, and other purposes,' and especially section seven thereof; and another Act of Congress entitled 'An Act to ratify and confirm a supplemental agreement with the Creek Tribe of Indians, and for other purposes,' and especially section sixteen thereof; each and all of which said Acts of Congress are hereby relied upon by this said beneficiary under said will, Nicholas V. Bilby, in the establishment and probation of said will; and said Bilby further charges and avers that said statutes of said state and laws thereof relied upon by said contestants are repugnant to and in violation of the rights, title and interest of said Bilby, in and to said lands and estate thus devised to him under said will, and mentioned and described therein; and, therefore, said Bilby hereby presents and insists that said state laws and statutes so relied upon by said contestants are null, void and ineffectual as to said will and the rights, title and interest of said Bilby in and to the lands and other property therein de-

scribed, under and by reason of said Acts of Congress and their respective provisions pertaining to the power of such Creek citizen to make will and dispose of their property; and further charge that said Waco Bruner never had any children and was never married, in his life time.

" H. B. MOFFIT, *Proponent*,
" NICHOLAS V. BILBY,
"LEWIS C. LAWSON, By Counsel.
" *Counsel.*" (Tr., pp. 8, 9 and 10.)

This court will notice that nowhere in the pleadings, on which this cause was tried and decided, was the question of jurisdiction of the state courts called in question. By an examination of the pleadings above set out, this court will notice that the only manner in which the various federal statutes relied on by the plaintiffs in error to give this court jurisdiction, were mentioned, was in pleading said statute to defeat the operation of a statute of the state of Oklahoma, section one, chapter 41 of the Session Laws of the state of Oklahoma, 1909, page 641, which provides:

> " That no person who is prevented by law from alienating, conveying or encumbering real estate while living, shall be allowed to bequeath the same by will."

Said statutes were not plead as a bar to the jurisdiction of the state courts, but in aid of said juris-

diction and on behalf of the jurisdiction of the state court. Being defeated on the trial of the cause on the facts as to the testamentary capacity of the deceased, Waco Bruner, before the trial court, and the highest appellate courts of the state, the plaintiffs in error for the first time complain of the want of jurisdiction of the state court in the probation of purported wills of full-blood Indians. In answer to this argument of the plaintiffs in error, the defendants in error would respectfully invite this court's attention to section 13 of the Enabling Act entitled "An Act to enable the people of Oklahoma and Indian Territory to form a constitution and state government and be admitted to the Union on an equal footing with the original states and to enable the people of New Mexico and of Arizona to form a constitution and state government and be admitted into the Union on an equal footing with the original states" (34 Stat. at L. p. 275), the last clause of said section 13, providing:

> " And that the laws in force in the Territory of Oklahoma, as far as applicable, shall extend over and apply to said state until changes by the legislature thereof."

The defendants in error would further call this court's attention to section 13, article 7, of the Constitution of Oklahoma, adopted by the people of said

state in pursuance of said above mentioned Enabling Act, which is as follows:

> " *Sec. 13.* The County Court shall have the general jurisdiction of a probate court. It shall probate wills, appoint guardians of minors, idiots, lunatics, persons *non compose mentis,* and common drunkards; grant letters testamentary and of administration, settle accounts of executors, administrators, and guardians; transact all business appertaining to the estates of deceased persons, minors, idiots, lunatics, persons *non compos mentis,* and common drunkards, including the sale, settlement, partition and distribution of the estates thereof. The County Court shall be held at the county seat, but the legislature may provide for holding sessions of the County Court at not more than two additional places in the county: *Provided,* That alternate sessions of County Court in Le Flore County shall be held at Talihina."

The defendants in error would further call the court's attention to section 28 of the Schedule of the Constitution of the State of Oklahoma, wherein it is provided as follows, to-wit:

> " *Sec. 28.* The terms and provisions of an Act of Congress, entitled 'An Act to amend sections sixteen, seventeen and twenty, of an act entitled "An Act to enable the people of Oklahoma and Indian Territory to form a constitution and state government and be admitted in-

to the Union on an equal footing with the original states; and to enable the people of New Mexico and of Arizona to form a constitution and state government and be admitted into the Union on an equal footing with the original states'',' are hereby accepted, and the jurisdiction of the cases enumerated therein is hereby assumed by the courts of the state.''

The court will notice that the Enabling Act, giving the people of the State of Oklahoma the right to form themselves into a state, provided, that the laws in force in the Territory of Oklahoma, as far as *applicable*, should be extended over the new state until changed by the legislature; that the provisions of this Enabling Act were accepted *in toto* by the people of the new state by provisions of their constitution and that the County Courts of the State of Oklahoma were created by the constitution made in pursuance of said Enabling Act; were given jurisdiction in the probate of wills, and it is the contention of the defendants in error in answer to the argument and contention of plaintiffs in error, that the probate courts of the State of Oklahoma are invested with ample authority and jurisdiction in the probate of wills executed by full-blood Indians the same as any other person; that the provisions of the Enabling Act and the constitution and laws of the State of Oklahoma are not inapplicable to any power or authority re-

served by the federal government over the Indians and their lands, but are entirely applicable and are necessary for the full protection of the rights of these dependent people. For as is stated in the brief of plaintiffs in error, the Act of Congress of the United States granting to full-blood Indians the power to alienate their lands by will is a special statute with certain limitations contained therein. The Congress recognized that in the Indian country there are two classes of Indians: *First*, that class which has "NO" relations either by consanguinity or affinity within the degree mentioned in said statute and might be classed as Class A; and that class of Indians who have relations by consanguinity or affinity within the degree mentioned in said statute, which might be classed as Class B.

Counsel for the plaintiffs in error has taken the position in his brief that the Congress of the United States delegated to the United States Commissioners and the county judges the power and authority to approve wills executed by Indians in Class B and that when such wills were approved by such officers that that was the only thing required to be done to make a valid and binding will and one that would pass absolutely the title to Indian lands without any further ceremony, in the probation of said will, in any court. As to the Indian in Class A, who did

"NOT" have relations either by consanguinity or affinity in the degree mentioned in said statute there were no provisions made for his protection whatever.

It is a matter of common knowledge that there are about as many Indians in one class as another. Therefore, it is unthinkable to believe that the Congress of the United States would make it possible for the full-blood Indian who happened "NOT" to have relations within the degree mentioned in the statute, could make a will absolutely binding and that would require no court action to pass title to his property upon his death; and for another full-blood Indian who happened "*to have*" near relatives that the only safe-guard to be thrown around him would be the approval of his will by County Judge or a United States Commissioner. The only limitation in the Act of Congress giving a full-blood Indian right to will his land is that he be of age and of sound mind, unless he has relations either by consanguinity or affinity within a certain degree. If he has such relatives then he must have his will approved by the United States Commissioner or County Judge. Therefore, if a full-blood Indian could will his land and pass title upon his death by the mere signing of his will, without having it probated, there is no protection whatever for the full-blood Indian of Class A, and we respectfully submit that such was never the intention of the Congress of the United States and

that the laws of the State of Oklahoma providing for the probation of wills is not inapplicable.

We know of no decision of any court where this proposition has ever been raised before, and therefore cite no authorities except the Enabling Act and the Constitution of the State of Oklahoma in support of our contention along this line. We would further call the court's attention to the fact that the probation of this alleged will was not denied in the state courts on account of the provisions of the Statutes of Oklahoma, section 1, chapter 41, Session Laws of 1909, page 741, *supra*, to defeat the operation of which the plaintiffs in error plead the federal statute referred to, in his brief; for the probation of said will was denied on the ground of "want of testamentary capacity of the deceased, Waco Bruner." Therefore the question of jurisdiction of the probate courts of the State of Oklahoma was not in issue, but on the other hand was relied upon by the plaintiffs in error through all the state courts of Oklahoma.

We find that it is the rule of decisions in this court that, "Where a party procures or acquiesces in the ruling under which a trial is conducted, he thereby waives the right to object to such ruling."

—*New York Elevated Railroad Co.* v. *Fifth National Bank,*
34 U. S. L. ed. 231.

Also:

> " Plaintiff in error cannot complain in the appellate court of an order made in an inferior court at his request or instance."
>
> —*U. S. ex rel Brown* v. *Memphis*,
> 24 U. S. L. ed. 937.

This court has held:

> " Where the construction of an instrument is left with the jury, the party against whom it should have been construed by the court cannot complain. *The fact that it was done at his own request, so precludes him from objection.*"
>
> —*Randon* v. *Toby*,
> 13 U. S. L. ed. 784.

This court has unmistakably followed the rule:

> " That a defense not set up in the answer is not available on appeal."
>
> —*Potter* v. *United States*,
> 27 U. S. L. ed. 330.

And there is no better settled rule of decisions in this court than:

> " That the concurrent decision of two courts on question of fact will be followed unless shown to be clearly erroneous."
>
> —*Brainard* v. *Buck*,
> 46 U. S. L. ed. 449.

This court held in the case of *New York Elevated Railroad Company* v. *Fifth National Bank*, 34 U. S. L. ed. 231, *supra*, that where a party *procures* or *acquiesces* in the ruling under which a trial is conducted, thereby waives a right to object to such ruling, and in the case at bar we would respectfully invite the court's attention to the fact that the plaintiffs in error not only procured, but insisted and plead statutes which he insisted warranted the court in ruling; and only complained of the ruling of that court when he found that such ruling was adverse to his cause.

It was held by this court in *U. S. ex rel Brown* v. *Memphis*, 24 U. S. L. ed. 937, *supra*, plaintiff in error cannot complain in the appellate court of an order made in an inferior court at his *request or instance*, and the ruling of all the courts below from the County Court to the Supreme Court of the state, was made at the *request* and *instance* of plaintiffs in error here, because in all those courts the plaintiffs in error were there insisting and requesting the Supreme Court, District Court and the County Court to probate the will of Waco Bruner, and insisting that all said courts had full power and authority to do so, and it was only after all three of said courts had denied the prayer and the petition of the plaintiffs in error, that he appeals to this court and asks that this case be reversed and the judgment rendered in favor of his client.

We, therefore, insist:

First. Under the Enabling Act passed by the Congress of the United States and the Constitution of the State of Oklahoma, and its provisions made by the people of this state in pursuance of said Enabling Act that the probate courts of the State of Oklahoma have ample authority to probate wills of full-blood Indians the same as any other person.

Second. That the plaintiffs in error, having invoked the jurisdiction of the state court and secured the ruling of said courts, are not now in a position to complain.

Third. That, not having raised the question as to the power of the courts, or the force and effect of this purported will and these various Acts of Congress, until this case was decided in the Supreme Court of the State of Oklahoma, and not relied upon and insisted upon really until after the petition for rehearing in the Supreme Court had been denied, that it is now too late for them to complain.

The defendants in error further insist that the probation of this will was denied by the state courts upon grounds other than those raised by the plaintiffs in error in their petition in error and indepen-

dent of any federal question that they may have ever raised in this cause, and even though there be a federal question involved the same is irrelevant and immaterial for the reason that the state court has denied the probation of this will *upon a proposition in which no federal question was involved.*

We, therefore, submit that the judgment of the Supreme Court of the State of Oklahoma should be affirmed.

Respectfully submitted,

GEORGE C. CRUMP,
JASPER L. SKINNER,
J. ROSS BAILEY,
Attorneys for Defendants in Error.

BILBY ET AL. *v.* STEWART ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 160. Submitted January 25, 1918.—Decided March 4, 1918.

The court may not review a judgment of a state supreme court resting on a non-federal ground adequate to support it.

Where the probate of the will of a full-blood Creek Indian was refused solely on the non-federal ground of mental incapacity, questions sought to be raised under acts of Congress, concerning the execution of the will, its legal effect, and the necessity for probate, *held* immaterial.

An attempt to raise federal questions through an application to file a second petition for rehearing in the state court comes too late.

Writ of error to review 153 Pac. Rep. 1173, dismissed.

THE case is stated in the opinion.

Mr. Lewis C. Lawson for plaintiffs in error.

Mr. George C. Crump, Mr. Jasper L. Skinner and *Mr. J. Ross Bailey* for defendants in error.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

This is a writ of error to the Supreme Court of Oklahoma, which affirmed on appeal the judgment of the Dis-

trict Court declining to probate an alleged will of Bruner, a full-blood Creek Indian, who, in the year 1912, died in that State possessed of his allotment, a bachelor without surviving parent.

The Act of April 26, 1906, c. 1876, 34 Stat. 137, relating to the Five Civilized Tribes, by § 19, prohibits members, for a period of twenty-five years, from alienating lands allotted to them; but by § 23, as amended by § 8 of the Act of May 27, 1908, c. 199, 35 Stat. 312, 315, provides that, "Every person of lawful age and sound mind may by last will and testament devise and bequeath all of his estate, real and personal, and all interest therein: *Provided*, That no will of a full-blood Indian devising real estate shall be valid, if such last will and testament disinherits the parent, wife, spouse, or children of such full-blood Indian, unless acknowledged before and approved by a judge of the United States court for the Indian Territory, or a United States commissioner, or a judge of a county court of the State of Oklahoma."

Section 1 of the Acts of Oklahoma for 1909, c. 41, provides:

"That no person who is prevented by law from alienating, conveying or encumbering real property while living shall be allowed to bequeath same by will."

Bilby, the main beneficiary named in the alleged will, and Moffitt, the executor, had first petitioned for its probate in the county court, where the heirs contested on the grounds of mental incapacity and undue influence and also on the ground that Bruner was by law prohibited from alienating or conveying his land. Probate was denied on the last ground; and the proponents appealed to the District Court where, as provided by the state law, it was tried *de novo*. That court, after an advisory verdict of a jury, denied probate solely on the ground of mental incapacity; and the errors assigned in the Supreme Court were substantially, that the judgment of the Dis-

trict Court was against the evidence. 153 Pac. Rep. 1173. The Supreme Court affirmed the judgment of the lower court and a petition for rehearing was denied without a statement of reasons. No federal question had been raised in the District Court, nor apparently up to that time in the Supreme Court. But an application was then made for leave to file a second petition for rehearing; and in it proponents set up, among others, the claim that because Bruner was a full-blood Creek Indian "the execution of said will and the legal effect thereof and the necessity or non-necessity of the probation of said will is thereby involved in this cause and presents federal questions." We need not, however, consider this contention. For since the Supreme Court rested its judgment upon a non-federal ground adequate to support it, the existence of a federal question is of no significance. *Cuyahoga River Power Co.* v. *Northern Realty Co.*, 244 U. S. 300. And, besides, the attempt to raise it comes too late. *St. Louis & San Franciso R. R. Co.* v. *Shepherd*, 240 U. S. 240. The writ of error is

Dismissed.